81-1857

No. _____

Supreme Court, U.S.
FILED
APR 5 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF OREGON,

Petitioner,

v.

JAMES EDWARD BRADSHAW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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QUESTION PRESENTED

Does a police officer violate the limits upon custodial interrogation established in *Edwards v. Arizona*, 451 U.S. 477 (1981), by reminding an arrestee who inquires, "What is going to become of me now?" of the arrestee's previously-asserted request for counsel and resuming his conversation with the arrestee, upon the arrestee's acknowledgment that he understands his rights?

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PETITION FOR CERTIORARI

The State of Oregon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on December 1, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing respondent's conviction (Appendix A, below) is reported at 54 Or. App. 949, 636 P.2d 1011 (1981). The order of the Supreme Court of the State of Oregon denying the State's petition for review of the decision of the court of appeals (Appendix B, below) is reported at 292 Or. 568, — P.2d — (1982).

JURISDICTION

The judgment of the Court of Appeals of the State of Oregon was entered on December 1, 1981. The Supreme Court of Oregon denied a timely petition for discretionary review on February 3, 1982; and this petition for certiorari was timely filed within 60 days of that date, pursuant to Rule 20, as time is computed under Rules 28 and 29. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

Constitution of the United States, Amendment XIV:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. Facts

Defendant Bradshaw was convicted in the state trial court of manslaughter in the first degree, driving while under the influence of intoxicants, and driving while his operator's license was revoked. At issue on appeal, and in this petition, is the admissibility into evidence of defendant's admission to a state police polygraph examiner that he was the driver of the vehicle involved in the fatal accident.

On September 14, 1980, state police corporal Hays interviewed defendant at a city police station, as a "possible suspect" in a vehicular homicide, after advising defendant of his *Miranda*[1] rights [Tr. 14, 16-17, 30, 32]. After denying that he had been involved in the accident, defendant stated, "And I do want an attorney before it goes very much further." Hays terminated the interview, placed defendant under arrest for furnishing liquor to a minor (presumably the deceased), and readvised defendant of his *Miranda* rights [Ex. 2].

Some time thereafter, either while still at the city police station or enroute to the county jail, defendant

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

asked Hays, "Well, what is going to happen to me now?" [Tr. 22]. In response, Hays testified at the pretrial hearing on the admissibility of defendant's post-arrest statements,

> . . . I says [*sic*], "You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say — because — since you have requested an attorney, you know, it has to be at your own free will." I says [*sic*] "I can't prevent you from talking, but you understand your place — you know, where your standing is here?" and he agreed. He says [*sic*], "I understand," and — you know, and we had conversation from then on . . . .

[Tr. 22].[2]

In the course of the ensuing conversation, defendant agreed to take a polygraph examination concerning the accident under investigation, and such an examination was administered the next day [Tr. 23, 42]. Defendant again was advised of his *Miranda* rights prior to the examination, and he executed a written consent to the examination [Tr. 43-44].

At the conclusion of the examination, the polygraph examiner told defendant that it was his opinion that defendant had not been truthful in response to questions about whether he had driven the vehicle involved in the accident [Tr. 45]. Defendant thereupon

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[2]Hays's testimony concerning this matter is reproduced more fully as Appendix C, below. At the pretrial hearing on the admissibility of his statements, defendant did not challenge this testimony in any respect. His testimony at that hearing concerned only his later conversation with the state police polygraph examiner [see Tr. 69-71].

admitted to the examiner that he had driven the vehicle, after having consumed a considerable amount of alcohol, and had passed out behind the wheel [Tr. 45-46].

At the pretrial hearing on the admissibility of defendant's post-arrest statements, defendant testified that the polygraph examiner had told him that the police "had ways of breaking [his story] down to prove that [he] was driving the truck" [Tr. 70].[3] The polygraph examiner denied this [Tr. 75]. The trial court found that "The evidence establishes that there were no threats, promises, or inducements" on the part of the police underlying defendant's statements [Tr. 81].

B. Raising and Preserving of Federal Question

Prior to trial, the State requested a hearing on the admissibility of defendant's post-arrest statements, pursuant to *Jackson v. Denno,* 378 U.S. 368 (1964), and *State v. Brewton,* 238 Or. 590, 395 P.2d 874 (1964) [Tr. 10]. At the conclusion of the hearing, the trial court ruled as follows:

> . . . I find that the statements made to Officer — or, to Corporal Rainey [the polygraph examiner] are admissible. The evidence establishes that there were no threats, promises, or inducements, that the

[3]Only moments before defendant so testified, the trial court and counsel had engaged in a lengthy conversation concerning the facts and holdings of several confession cases, including *State v. Johnson,* 37 Or. App. 209, 586 P.2d 811 (1978), in which the police were held improperly to have induced an arrestee to confess, by telling him that his story was untrue and would not be hard to break down [Tr. 57-58, 60-62, 65-67].

> defendant was properly advised of his rights and that he did understand them and I also find that the evidence supports a conclusion that although Mr. Bradshaw had indicated his intent to have an attorney before it goes very much further, that within a short time after he made that statement he was initiating conversations in spite of the officer's replying to him, "I can't talk with you," and that I think that when I look at the total context of this, that there was, in fact, a change of this man's mind, that it was not brought on by any persuasion or argumentative kind of statements that were improper in any way and that the statements finally made to Officer Rainey — or, to Corporal Rainey were voluntary and followed a waiver and a knowing waiver of his right to remain silent . . . .

[Tr. 81-82].

On appeal to the state court of appeals, defendant assigned this ruling as error, as follows:

> The trial court erred in failing to suppress defendant's statements made after his assertion of the right to counsel.

[App. Br. at 10, *State v. Bradshaw,* 54 Or. App. 949, 636 P.2d 1001 (1981)].

When the court of appeals reversed defendant's conviction on this ground (Appendix A, below), the state petitioned the state supreme court for discretionary review, on the ground that

> The Court of Appeals erred in treating a police officer's reasonable response to an arrestee's question, "What is going to happen to me now?" as the functional equivalent of the "police-initiated" interrogation condemned in *Edwards v. Arizona,* — US —, 101 S Ct 1880, 68 L Ed 2d 378 (1981)

[Petition for Review at 1, *State v. Bradshaw,* 292 Or. 568, — P.2d — (1982).

REASONS FOR GRANTING THE WRIT

By treating a police officer's reasonable response to an arrestee's question, "What is going to happen to me now?" as police-initiated interrogation of the kind condemned in *Edwards v. Arizona,* the Oregon Court of Appeals has applied the Fifth Amendment in a manner which establishes in Oregon, and which threatens to serve as a precedent for establishing in other jurisdictions, erroneous standards for determining whether interrogation is improperly coerced, whether it is "police-initiated," and indeed, whether it is "interrogation" at all.

In *Edwards v. Arizona,* 451 U.S. 477 (1981), a case whose facts, as summarized in the Court's opinion, are so egregious that we are suprised it reached the Court without being reversed, this Court set aside the conviction of an accused who reasserted his previously-invoked right to counsel, only to be told that he "had" to talk to the police. The majority opinion of the Court stated:

> . . . [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation. We further hold that an accused, such

> as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.

451 U.S. at 484-485.

The present case is not one in which the police should be held to have initiated further interrogation of an accused who had invoked his right to counsel. Defendant initiated the conversation himself, by inquiring of the arresting officer, "What is going to happen to me now?"

We do not agree with the state court of appeals that the conversation which followed defendant's inquiry must be deemed "interrogation," simply because it ultimately resulted in defendant's being asked to submit to a polygraph examination, which in turn led to his making incriminating admissions. This Court indicated that such is not the law in *Rhode Island v. Innis,* 446 U.S. 291 (1980).

But even if the resumed conversation must be deemed "interrogation," it cannot be deemed "police-initiated," in the manner condemned in *Edwards.* The arresting officer resumed the conversation only after defendant had inquired about his future, and only after the officer had warned him that resumption of the conversation would constitute a waiver of defendant's previously-asserted right to counsel.

And even if the state court of appeals correctly characterized the officer's conduct, in response to defendant's question, as "[taking] advantage of the opening to reinterrogate defendant," the officer cannot be said to have taken unfair advantage of a defendant who was fully warned that he was resuming a conversation which he was free to terminate again at any time. In this respect, at least, the arresting officer's resumption of his conversation with the defendant in this case more closely resembles the non-coercive questioning of a properly-advised defendant which was upheld in *Michigan v. Mosley,* 423 U.S. 96 (1975), than the coercive tactics condemned in *Edwards. Edwards* did not overrule *Mosley,* or at least did not do so expressly; and the rationale of *Mosley,* rather than that of *Edwards,* should be applied in cases like the one at bar.

If *Edwards* is properly understood as forbidding, on Fifth-Amendment grounds, any resumption of conversation between the police and an arrestee who has invoked his right to counsel — even when, as here, the accused initiates the conversation and is reminded of his constitutional rights — simply because the police might attempt, in the course of the renewed conversation, to obtain incriminating admissions, we respectfully submit that *Edwards* should be re-examined; and if the Oregon Court of Appeals has misunderstood the breadth of *Edwards,* it should be told so. The

Oregon court's construction of *Edwards* in this case not only significantly limits the extent of permissible police interrogation beyond that required by a proper reading of *Edwards*: it encourages the police to do nothing to assuage arrestees' understandable concern over their situation. Such a result is neither required by the Constitution nor desirable.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Oregon.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Solicitor General
THOMAS H. DENNEY
Assistant Attorney General
Counsel for Petitioner

April 5, 1982

APPENDIX A
OPINION OF OREGON COURT OF APPEALS
December 1, 1981

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent,
v.
JAMES E. BRADSHAW,
Appellant.
(No. 20-414, CA A20459)

Appeal from Circuit Court, Tillamook County.

Delbert B. Mayer, Judge.

Argued and submitted August 31, 1981.

John Daugirda, Deputy Public Defender, Salem, argued the cause for appellant. With him on the brief was Gary D. Babcock, Public Defender, Salem.

Thomas H. Denney, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and William F. Gary, Solicitor General, Salem.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

ROBERTS, J.

Reversed and remanded for a new trial.

ROBERTS, J.

Defendant appeals his convictions for first degree manslaughter, driving while under the influence of intoxicants and driving while his license was revoked. Defendant contends the trial court erred in failing to suppress statements he made after he requested counsel. We reverse.

Defendant had been asked to accompany an Oregon State Police officer, who was investigating a fatal automobile accident, to the Rockaway Police Department for questioning, and there is no dispute that he went voluntari-

ly. The officer considered defendant a suspect; he was advised he was not in custody and was free to leave. Once at the station, defendant was advised of his *Miranda*[1] rights. He denied involvement with the automobile accident. He was charged with furnishing liquor to a minor and was placed in custody. At this point defendant indicated he wanted an attorney.

Sometime thereafter, either prior to or during the course of his transfer to the Tillamook County jail, defendant inquired of the officer "Well, what is going to happen to me now?" Defendant recalls this was while he was enroute by automobile from the police station to the county jail; the state interprets the record as indicating the query was made while he was still at the police station. The officer testified that he told defendant "You do not have to talk to me * * * since you have requested an attorney, you know, it has to be at your own free will." He said the defendant told him he understood, and, as the officer testified, they "had a conversation from then on." They discussed what defendant would be charged with and where he was going to go. Then the officer testified, "I believe I put him in the front seat — I am sure of this — so we could talk and then I proceeded to the Tillamook County jail and we had a considerable amount of conversation on the way there." During this time, the police officer reiterated to defendant his own theory of the auto accident, which apparently implicated defendant to some degree. The officer suggested defendant could take a polygraph examination and "clear this matter up." Defendant agreed to talk to the polygraph examiner.

The next day the polygraph examiner, who was not told defendant had requested counsel, administered a polygraph examination. Before the examination, defendant was again advised of his *Miranda* rights and signed a waiver card. After the examination, defendant says, the officer administering the test told him he was not telling the truth and that "they had ways of breaking it down to prove that I was driving the truck." According to the

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[1] *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966).

officer's testimony, he told defendant that based on the results of the examination, he did not believe defendant was telling the truth and that he believed defendant was driving the truck at the time of the accident.

The court found that the police made no threats, promises or inducements to talk, that defendant was properly advised of his rights and understood them and that within a short time after requesting an attorney he changed his mind without any impropriety on the part of the police. The court held that the statements made to the polygraph examiner were voluntary and the result of a knowing waiver of his right to remain silent.

While we are bound by the historical facts as found by the trial court, where they are supported by the evidence, the question of whether defendant knowingly and intelligently waived his right to counsel is a question to be determined by this court pursuant to our duty to interpret constitutional standards and require conformance thereto. *Ball v. Gladden,* 250 Or 485, 443 P2d 621 (1968). This case is controlled by the recent decision of the U. S. Supreme Court in *Edwards v. Arizona,* — US —, 101 S Ct 1880, 68 L Ed 2d 378 (1981); we hold that the statements defendant made to police were not made after a valid waiver of his rights.

In *Edwards* the defendant was arrested pursuant to a warrant and taken to the police station, where he was informed of his *Miranda* rights. After giving a taped statement presenting an alibi defense, he asked for an attorney "before making a deal." Police ceased the questioning, and defendant was taken to jail. The next morning, two detectives, who were colleagues of the officer who interrogated Edwards the day before, arrived at the jail and asked to see him. Edwards told the detention officer he did not want to talk to anyone and was told "he had" to talk to the detectives. After being advised again of his *Miranda* rights, Edwards confessed. The trial court found that "the waiver and confession were voluntarily and knowingly made." The Supreme Court held that the use of the confession violated Edwards' rights under the Fifth and Fourteenth Amendments, as construed in *Miranda,* and reversed.

The crux of the court's opinion is as follows:

> "* * * [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused * * * having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges or conversations with the police.*" (Footnotes omitted.) (Emphasis supplied.) 68 L Ed 2d at 386.

We do not construe defendant's question about what was going to happen to him to have been a waiver of his right to counsel, invoked only minutes before, or anything other than a normal reaction to being taken from the police station and placed in a police car, obviously for transport to some destination. Though a conversation ensued, the police officer clearly took advantage of the opening to reinterrogate defendant about his culpability and suggest the lie detector test, which was administered the next day.

The administration of the lie detector test and the subsequent interrogation of defendant were not at his suggestion or request, but were at the instance of authorities. The *Edwards* court emphasized that

> "it is inconsistent with *Miranda* and its progeny for authorities, *at their instance,* to reinterrogate an accused in custody if he has clearly asserted his right to counsel." (Emphasis supplied.) 68 L Ed 2d at 387.

Thus, under the reasoning enunciated in *Edwards,* defendant did not make a valid waiver of his Fifth Amendment rights, and his statements were inadmissible.

Reversed and remanded for a new trial.

APPENDIX B
ORDER OF OREGON SUPREME COURT

[Letterhead omitted in printing]

February 3, 1982

Dave Frohnmayer
Attorney General
State Office Building
Salem, Oregon 97310

RE: State v. Bradshaw
CA A20459 SC 28347

Dear Mr. Frohnmayer:

The Supreme Court today denied respondent's petition for review in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

Very truly yours,

Marilyn Hartley
Supreme Court Calendar Clerk

APPENDIX C
TESTIMONY OF ARRESTING OFFICER (EXCERPT)

(see page 5, above)

Q [By the prosecutor] You indicated you had some conversation with him after he was taken into custody; is that correct?

A Yes. This was — after the end of the tape recording I handcuffed him there in the Rockaway Police Department. Then he asked me at this time — he said, "Well, what is going to happen to me now?"

Q So he talked to you —

A Yes, and I at that point, being familiar with the law that Mr. Bassett was talking about, made it very specific. I says, "You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say — because — since you have requested an attorney, you know, it has to be at your own free will." I says, "I can't prevent you from talking, but you understand where your place — you know, where your standing is here?" and he agreed. He says, "I understand," and — you know, and we had conversation from then on, but I was very specific at this point, being familiar with the law, on his voluntary statements and that's what they were and —

Q Did you make any threats, promises, or inducements to him in order to get him to talk to you some more?

A No, I didn't. As you can tell by the conversation, we were being quite — you know, it was a casual conversation throughout the entire thing and we continued on this basis. There was several comments made about where he was going to go and what he would be charged with and I put him in the police car. I believe I put him in the front seat — I am sure of this — so we could talk and then I proceeded to the Tillamook County Jail and we had a considerable amount of conversation on the way there.

Q Okay. What was the general nature of that conversation?

A Well, we talked about, again, the theory that I had mentioned on the tape about what had happened, the accident, and whatnot and he says — I made the statement

— I says, "Well, I can have a polygraph examiner come down and talk to you tomorrow and we can clear this matter up and find out actually what happened." I think he made something — he said, "What do you mean, a polygraph examiner?" and I said, "Well, a lie detector test," and I explained it to him and he said, "Okay. That will be fine. I want to do anything I can to clear this matter up," and these statements, among others, were made. I —

Q But these statements were made after you told him for the second time he didn't have to talk to you because he requested a lawyer?

A Yeah, these statements were made while in route to the county jail in the patrol car. We had conversation all the way there and we talked about several things, the fact that he was from Missouri and how long he had been back and he had lived in St. Helens and knew several police officers from St. Helens, I believe, and we had general conversation all the way to the county jail.

Q Maybe I missed a little something. What was his response? He agreed that he wanted a polygraph?

A Yes, he did. After I explained what a polygraph examiner was, he agreed that he would talk to the individual. He told me that he — he said he would do anything he could to help clear this matter up and there was something else about Lowell was his friend and he wanted to take care of the matter and make sure everything got taken care of.

Q Okay. And then you what, you lodged him, did you?

A Yes, he was taken to the Tillamook County Jail where he was lodged at that time for Furnishing Liquor to a Minor.

[Tr. 22-24].

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CLERK

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OCTOBER TERM, 1982

STATE OF OREGON,

Petitioner,

v.

JAMES EDWARD BRADSHAW,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 5, 1982
CERTIORARI GRANTED NOVEMBER 1, 1982

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The following opinions and orders have been omitted in printing this appendix, because they appear on the following pages of the printed petition for certiorari:

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Order of the Oregon Supreme Court denying review, dated Feb. 3, 1982	14

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Oct. 27, 1980 — District Attorney's Information filed in Circuit Court for Tillamook County, Oregon, accusing Bradshaw of manslaughter in the first degree, driving while under the influence of intoxicants, and driving while revoked.

Dec. 9-10, 1980 — Pretrial hearing and trial to court. Bradshaw found guilty as charged.

Feb. 23, 1981 — Judgment entered. Bradshaw sentenced to seven years on manslaughter charge, with three years to be served before possible parole; to three years, to be served concurrently, on driving while revoked charge; and to time already served in county jail on driving while under the influence charge.

Mar. 20, 1981 — Bradshaw's notice of appeal filed.

Dec. 1, 1981 — Opinion of Oregon Court of Appeals entered, reversing circuit court and remanding for new trial.

Dec. 31, 1981 — State's petition for reconsideration or review filed.

Jan. 14, 1982 — Order of Court of Appeals entered, denying reconsideration.

Feb. 3, 1982 — Order of Oregon Supreme Court entered, denying review.

Apr. 5, 1982 — State's petition for certiorari filed.

Nov. 1, 1982 — Certiorari and Bradshaw's motion for leave to proceed *in forma pauperis* granted.

DISTRICT ATTORNEY'S INFORMATION

[filed October 27, 1980]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF TILLAMOOK

STATE OF OREGON, Plaintiff,	)	NO. 20-214
vs.	)	DISTRICT ATTORNEYS [*sic*] INFORMATION
JAMES EDWARD BRADSHAW, Defendant.	)	ORS 163.118 Class A Felony ORS 487.540 Class A Misdemeanor ORS 487.560 Class C Felony

COUNT I

The above named defendant is accused by this information of the crime of MANSLAUGHTER IN THE FIRST DEGREE committed as follows:

The said defendant on or about September 13, 1980 in Tillamook County, did unlawfully and recklessly, under circumstances manifesting an extreme indifference to human life, cause the death of another human being, to wit: Lowell Clifford Reynolds, by driving a motor vehicle in which the said Reynolds was a passenger at a time when defendant Bradshaw was under the influence of intoxicants, by driving said motor vehicle off the highway and causing it to strike a tree and come to rest upside down in a ditch, near milepost 48 on Highway 101 North near Rockaway, Oregon, and by failing to obtain medical attention for the said Reynolds or otherwise assist Reynolds, who was injured as a result of Bradshaw's driving,

COUNT II

As part of the same act and transaction the above named defendant is accused by this information of the crime of DRIVING WHILE UNDER THE INFLUENCE OF INTOXICANTS, committed as follows:

The said defendant on or about September 13, 1980 in Tillamook County did unlawfully drive a vehicle upon a highway, to wit: Highway 101 North near milepost 50 in Rockaway, Oregon while under the influence of intoxicants, the said defendant having been previously convicted of a traffic crime, to wit: Driving Under the Influence of Intoxicants on January 26, 1979 in Multnomah County, Oregon,

COUNT III

As part of the same act and transaction the above named defendant is accused of the crime of DRIVING WHILE REVOKED committed as follows:

The said defendant on or about September 13, 1980, in the said county of Tillamook, did unlawfully and feloniously drive a motor vehicle upon a highway, to wit: Highway 101 North near milepost 50 in Rockaway, Oregon, during a period when his license to drive a motor vehicle in this State has [*sic*] been revoked by the Circuit Court of the State of Oregon for Columbia County, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated October 27, 1980.

[Signature omitted in printing]

TRANSCRIPT OF PRETRIAL HEARING

(excerpts)

IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF TILLAMOOK

[Title of case omitted in printing]

[December 9, 1980]

[10]

* * * * *

MR. GROVE: Your Honor, at this time the State has asked that the Court hold a pre-trial hearing with regard to the admissibility of statements made by the defendant. I believe that that type of hearing is allowed by and encouraged by *State v. Brewton* [238 Or. 590, 395 P.2d 874 (1964)] and if Mr. Bassett has no objection, I would like to proceed at this time.

* * * * *

[11]

* * * * *

* * * I think, your Honor, in order to set the historical background for the statements made to Trooper Rainey, I am going to have to go through how the statements were obtained Sunday night, show the condition that the defendant was in, the atmosphere that he was in and basically set the circumstances for the Court to set — basically show how that lead [*sic*] up to statements given to Trooper Rainey.

THE COURT: All right. So as I understand it then, we have two statements: One on the 14th—

MR. GROVE: Correct.

THE COURT: — in the evening and there's no objection to — regarding the voluntariness of that statement?

MR. BASSETT: Right, your Honor.

THE COURT: Okay. All right. Then with respect to the second statement which is contested, we will proceed to take the testimony regarding that and I will hear any opening statements or remarks you have, if you wish to make them.

MR. GROVE: I will waive any opening remarks at this

[12]

time. your Honor.

MR. BASSETT: I think I should too, your Honor.

THE COURT: All right. You may call your first witness.

MR. GROVE: Corporal Hays.

GERALD LEE HAYS, a witness called on behalf of the State, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GROVE:

Q Will you state your full name for the record, please.

A Gerald Lee Hays. The spelling of the last name is H-a-y-s.

Q And how is it that you are employed?

A I am a corporal with the State Police assigned as Assistant Station Commander out of the Tillamook Patrol Office.

Q How long have you been with the Oregon State Police?

A Not quite ten years.

Q All right. And how long have you been in Tillamook?

A Not quite three years.

Q Okay. In that capacity with the Oregon State Police, did you ever have occasion to come into contact with Mr. Bradshaw, the defendant in this matter?

A Yes, I did.

[13]

Q When was it initially that you came into contact with Mr. Bradshaw?

A Okay. It was on the evening of September 14, 1980, in the City of Rockaway.

Q And what had caused you to come into contact with Mr. Bradshaw?

A I was conducting an investigation on a fatal motor vehicle accident which occurred on — or, was discovered on the 14th of September on Highway 101 just north of Rockaway.

Q Okay. And what led you to Mr. Bradshaw? Why was it that you were coming into contact with him?

A The deceased lived in a cabin owned by Irma Stockdale in Rockaway. I had gone to that cabin with hopes of identifying the deceased's next of kin, his parents. I had contacted Officer Buxton from the Rockaway Police Department for his assistance in locating this next of kin and he had advised me that there had been an assault reported at the next of kin's — or, at the deceased's cabin in the evening of the 13th of September and when we were at the cabin looking for personal effects or something that may lead us to the next of kin, Mr. Bradshaw contacted us there at the cabin and he was identified by the Rockaway police officer that he, in fact, was the individual who had reported to have been assaulted there the evening before.

Q The 13th?

[14]

A The 13th.

Q So this would have been the afternoon or the evening of the 14th when you first came into contact with Mr. —

A Yes, it was the evening of the 14th that I came into contact with Mr. Bradshaw.

Q Do you remember the — that initial conversation out at the cabin or did you have much conversation with him there?

A We had some conversation with him there. It was — mainly I was discussing, you know, why I was there and he had known the deceased, Mr. Reynolds, and we talked about, you know, his acquaintance with him and whatnot. It was kind of idle conversation and then we went into — it got carried on into actually the assault case itself and we went into the cabin and he showed me and — or, Officer Buxton and myself where he had been assaulted and whatnot when we got into the cabin, so the idle conversation actually led into the assault that occurred the night before.

Q Okay. He indicated he had been assaulted the night before; is that correct?

A That's correct, and in the cabin there that was rented by the deceased.

Q Okay. Did he indicate to you who had assaulted him?

A Yes. He gave me three names and a picture was identified in the cabin which he pointed out as the deceased's girlfriend, Kimberly Asher. Her full name is Kimberly, but he gave the

[15]

name of Kim Asher. There was a picture laying on the table there and I asked him if this was the girl that was there the night before and he said it was. There were two men, one who he identified by the name of Bash, B-a-s-h. He didn't know the individual's first name, but he just remembered that the last name was

Bash or the name was Bash that he remembered. The third individual was a man who he could not identify. He just described him as a middle-aged man, standard features. The fourth individual that was there in the cabin other than the deceased was a girl which he identified as the deceased's sister by the name of Cynthia or Cindy. He didn't know her last name, but these were the four people in addition to the deceased that were in the cabin at the time the assault occurred.

Q Okay. Did he indicate which one of them allegedly assaulted him?

A Yes. It was his opinion and he explained that the statement which was made just prior to him being hit on the head was, I believe, "Bash, don't do that," or, "Bash, don't hit him," so it was his opinion that Bash was the one who did the assault.

Q Okay. What did you do then after having this conversation with the defendant?

A We — I had previously, during my investigation that afternoon, contacted the deceased's girlfriend, Kimberly Asher.

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The purpose of contacting her was to let her know of the boyfriend's death and there was some inconsistencies with what Mr. Bradshaw had told me and with what she had told me as far as who had been present the evening before.

Q Did she indicate she had been to the cabin the evening before?

A No. She claimed she was working, which was verified by her employer, that evening.

Q Okay.

A While I was at the cabin and had talked to Mr. Bradshaw, the individual mentioned before, Mr. Bash, who turned out to be Mr. David Bash, showed up at the cabin. He had heard also through friends that Mr. Reynolds had been killed and that we wanted to talk to him and I talked to him at the cabin that evening and he had told me that — his story was inconsistent with Mr. Bradshaw's. He had been at a party on the Kilchis the evening of the 13th and was with several friends who said they would be glad to verify his whereabouts. The two inconsistencies at that time with Mr. Bradshaw's statement — the question of what actually had occurred on the evening of the 13th and I at that time asked Mr. Bradshaw if he would be willing voluntarily to accompany me to the Rockaway Police Department where we can hold a taped interview and which he acknowledged he would voluntarily.

Q At that time was he in custody?

[17]

A No, he was not. I made it very clear to him he was not in custody. He was free to leave. In fact, he had indicated that he was leaving for St. Helens that night and I told him that, you know, this was a voluntary-type thing,

but we wanted to clear up the matter and he agreed. He wanted to clear the matter up and there was some question about the accident and he agreed to accompany me to the Rockaway Police Department.

Q Okay. Maybe — just for the Court's clarification maybe you can go back and just very briefly indicate what was found at the scene of the accident and what made you think that perhaps somebody else was driving the car.

A Well, at the scene of the accident — it was a one car — or, one pickup accident. It occurred on — northbound on Highway 101. The vehicle had gone off the road, struck a tree, and the deceased, Mr. Reynolds, was pinned on the passenger's side through the window, partially through the window when I arrived at the scene. There was — the fact of the location of the body and whatnot drew some suspicion. It was not a natural type of position that I would find on that type of an accident. I became concerned and then finding the inconsistencies of the stories and whatnot caused me to become more curious about actually what did happen.

Q Okay. When you went down to the Rockaway Police Department then, would it be fair to term Mr. Bradshaw as a suspect at that time?

[18]

MR. BASSETT: I think that's an improper conclusion he is asking, your Honor. Did he suspect from what he saw.

THE COURT: Well, you may rephrase the question.

Q BY MR. GROVE: All right. When you took him down to the Rockaway Police Department, was it your intent to question him further about the automobile accident and the events that had transpired the night before?

A Yes, it was. The inconsistencies at the accident scene and the inconsistencies with Mr. Bradshaw's alleged assault drew my suspicion, so there was — I was — I did have in my mind to further investigate the possibility of some problems that actually had occurred the night before.

Q How did he get down to the Rockaway Police Department?

A I transported him in my patrol car.

Q Was he handcuffed?

A No, he was not.

Q Did he ride in the front or back seat that you recall?

A In the front seat.

Q When you got to the Rockaway Police Department, did you then take a statement from him?

A Yes, I did.

Q And was that statement taped?

A Yes, it was.

Q All right. Prior to the time that you made the taped statements, did you make any threats, promises, or inducements

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to Mr. Bradshaw in order to get him to talk to you?

A No, I did not. In fact, as indicated on the tape, I made it very clear that this was a voluntary type of thing, that he was — and he agreed he was not under duress, under any threats of any type, that he was being recorded and he fully understood what was going on.

Q All right. I want to hand you what has been marked —

THE CLERK: Exhibits one and two are marked for identification.

(State's Exhibit number one marked for identification.

(State's Exhibit number two marked for identification.)

Q BY MR. GROVE: — marked for purposes of identification as State's exhibit number one and ask if you can identify that as the tape that you made of your conversation with Mr. Bradshaw.

A Yes, it is. It has my name, the date and identifying features of the tape on there.

Q All right. At this time, your Honor, I would ask permission to play the tape for the Court.

THE COURT: All right. This is the first conversation regarding which there is no objection?

MR. BASSETT: Yes, your Honor.

MR. GROVE: That's correct, your Honor, but again I

[20]

think it's necessary to — and I also have State's exhibit number two. I have talked to Mr.

Bassett about this. This is a transcript of the recording[1] and it may help aid the Court in listening to it.

* * * * *

(Mr. Grove plays tape cassette and the following proceedings were had:)

Q BY MR. GROVE: Now, you indicated, Corporal Hays, that you terminated the interview because Mr. Bradshaw requested an attorney; is that correct?

A That's correct.

Q All right. After that did you have any further conversation with Mr. Bradshaw?

A Yes, I did.

Q Could you tell the Court how that came about happening.

A Well, we had — I had taken him into custody and handcuffed him there in the Rockaway Police Department. I had gone back in the room and —

MR. BASSETT: If it please your Honor, I will object

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to any conversation after they acknowledged that the defendant wanted an attorney when they didn't furnish him one and there was no attorney present after that agreement and I object to any further testimony. He has started to testify to further conversations about it. It's my understanding of the law that you can't do that. Once they have asked for a lawyer

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[1] [This transcript is reprinted at pp. 45-73, below.]

and they have agreed to furnish him one, they can't talk to him any more until the attorney is furnished which never was done.

THE COURT: Okay. I assume that in this line now you won't be attempting to elicit any statements until you have laid a foundation to show a waiver or —

MR. GROVE: A waiver, that's correct, your Honor.

THE COURT: All right. You understand what we are —

THE WITNESS: Yes, your Honor.

THE COURT: Okay. I will sustain the objection regarding any statements until you do lay a foundation which would show then that there had been a waiver or some — and necessary voluntariness and that sort of thing, so —

MR. BASSETT: If it please your Honor, I don't want to persist in this, but my objection was that there can't be a waiver, that there has to be an attorney furnished. Otherwise the rule wouldn't do any good. I want to put that into the record for my objection, that there can't be a waiver.

THE COURT: All right. Well, as I understand the law — I forget the name of the cases, but a defendant can

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change his mind and there can — a waiver can occur, but the foundation will have to be laid to show that that, in fact, is what happened, so you may proceed, Mr. Grove. Overruled.

Q BY MR. GROVE: You indicated you had some conversation with him after he was taken into custody; is that correct?

A Yes. This was — after the end of the tape recording I handcuffed him there in the Rockaway Police Department. Then he asked me at this time — he said, "Well, what is going to happen to me now?"

Q So he talked to you —

A Yes, and I at that point, being familiar with the law that Mr. Bassett was talking about, made it very specific. I says, "You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say — because — since you have requested an attorney, you know, it has to be at your own free will." I says, "I can't prevent you from talking, but you understand where your place — you know, where your standing is here?" and he agreed. He says, "I understand," and — you know, and we had conversation from then on, but I was very specific at this point, being familiar with the law, on his voluntary statements and that's what they were and —

Q Did you make any threats, promises, or inducements to him in order to get him to talk to you some more?

A No, I didn't. As you can tell by the conversation, we

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were being quite — you know, it was a casual conversation throughout the entire thing and

we continued on this basis. There was several comments made about where he was going to go and what he would be charged with and I put him in the police car. I believe I put him in the front seat — I am sure of this — so we could talk and then I proceeded to the Tillamook County Jail and we had a considerable amount of conversation on the way there.

Q Okay. What was the general nature of that conversation?

A Well, we talked about, again, the theory that I had mentioned on the tape about what had happened, the accident, and whatnot and he says — I made the statement — I says, "Well, I can have a polygraph examiner come down and talk to you tomorrow and we can clear this matter up and find out actually what happened." I think he made something — he said, "What do you mean, a polygraph examiner?" and I said, "Well, a lie detector test," and I explained it to him and he said, "Okay. That will be fine. I want to do anything I can to clear this matter up," and these statements, among others, were made. I —

Q But these statements were made after you told him for the second time he didn't have to talk to you because he requested a lawyer?

A Yeah, these statements were made while in route to the county jail in the patrol car. We had conversation all the way there and we talked about several things, the fact that

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he was from Missouri and how long he had been back and he had lived in St. Helens and knew several police officers from St. Helens, I believe, and we had general conversation all the way to the county jail.

Q Maybe I missed a little something. What was his response? He agreed that he wanted a polygraph?

A Yes, he did. After I explained what a polygraph examiner was, he agreed that he would talk to the individual. He told me that he — he said he would do anything he could to help clear this matter up and there was something else about Lowell was his friend and he wanted to take care of the matter and make sure everything got taken care of.

Q Okay. And then you what, you lodged him, did you?

A Yes, he was taken to the Tillamook County Jail where he was lodged at that time for Furnishing Liquor to a Minor.

Q Okay. To the best of your knowledge, would he have had an opportunity to make a phone call to a lawyer had he had the chance?

A Yes, at the jail, I believe. He didn't know one and he wanted to get a hold of Mrs. Stockdale, I believe, Irma Stockdale and he had a couple other things to do because I believe Mrs. Stockdale was leaving that night to go to St. Helens.

Q Okay.

A And he wanted to let them know and — in fact, a police

[25]

officer, I believe, went back to the — and told Mrs. Stockdale that he was in the Tillamook County Jail.

Q Okay. Good. Now, are you aware of the fact that there was a conversation with Trooper Rainey the next day?

A Yes, I was. I had called Lieutenant Winterfeld the next morning at eight o'clock and advised him that I would like to have a polygraph examiner in addition to Crime Lab and other expert people come down and assist me on this investigation and Trooper Rainey did come down to Tillamook the next morning and interviewed Mr. Bradshaw.

Q That would have been the morning of the 15th?

A That's correct.

Q All right. Were you present when that was done?

A No, I was not.

Q All right. Did you inform Trooper Rainey of the conversation that you had with Mr. Bradshaw?

A Yes —

MR. BASSETT: I would object to that, your Honor.

THE WITNESS: — in substance —

MR. BASSETT: I would object to any conversation between this officer and another officer.

MR. GROVE: Well —

THE COURT: Well, as long as the other — you are not going to bring out the other officer's statements, are you, in the absence of the defendant? It's going to be what this

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officer told the —

MR. GROVE: Sure, right.

THE COURT: — the other officer?

MR. GROVE: The other officer, the polygraph man.

THE COURT: Okay. How do you respond to that, Mr. Bassett?

MR. BASSETT: My objection was that this officer is asked if he had a conversation with another officer concerning this case in the absence of the defendant and I would object to that as not binding upon this defendant. It's hearsay.

THE COURT: Well, I will sustain any objections regarding what the other officer said to this officer, but I will overrule the objection regarding what information this witness might have given the other officer preparatory to the administration of any examination or whatever.

MR. GROVE: Right.

THE COURT: Overruled. You may proceed.

Q BY MR. GROVE: Okay. Did you — what did you tell him about Mr. Bradshaw? Did you tell him basically what you —

A Yes, I more or less laid out the entire case of what I knew about it to that point.

Q Okay. Did you inform the — Trooper Rainey, do you recall, of the business about at one point the defendant had asked for a lawyer and at another point indicated he wanted to —

A No, I did not.

[27]

Q And you were not present when the interview was conducted with Mr. Bradshaw; is that correct?

A No, I was not.

Q All right. I have no further questions.

CROSS-EXAMINATION

BY MR. BASSETT:

Q Your Honor, my objection continued through all of this, didn't it? When I objected to any conversation after he requested a lawyer, my objection goes until this moment, does it not?

THE COURT: Well —

MR. BASSETT: I wonder if I could make myself clear. It is my position that once the defendant has asked for a lawyer and once the police have said, "We are going to conclude this interview . . ." — first he said investigation, now interview -- ". . . because you have asked for a lawyer," it is my position, your Honor, that there can be no more questioning of the defendant and I can't support my position on it, but I am of the opinion, contrary to what your Honor said, that you can't waive it, you can't

waive that. I didn't find that case. I did find — in support of my motion I will cite *Vassiouni,* V-a-s-s-i-o-u-n-i — I assume it's *Vassiouni* — On Criminal Law and Its Processes, page 412.

> "The Supreme Court seems to consider in-custody police interrogations as inherently coercive and one might also detect in certain decisions a

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> feeling that such police practices are also deemed inherently oppressive and abusive. The word 'interrogation' in itself connotes a forceful question if not inquisitorial."

I submit that in support of my position, that they have to quit, otherwise, your Honor, the rule would be so diluted it wouldn't be worth anything. If a person asks for a lawyer and they said, "Yes, we will quit and get you one," and then go right on talking and talking when they get to Officer Rainey — and I am going to object to that, too. That was the next day and they still hadn't furnished a lawyer. We are not quarreling about what was said, your Honor. We are quarreling — we are disagreeing on the significance of it. Officer — this officer says that he had a conversation and seemed to persuade the defendant to continue talking and it's my position from a legal standpoint that that can't be done and that is what I base my objection on.

THE COURT: Well, I will — I am going to overrule the objection regarding any statements made up through the end of the officer's testimony at this point. First of all,

none of those statements that have been made in any way tend to incriminate, but that's not the point. At least from what I have heard so far, there was really no interrogation. There is no question in my mind that up to this point — or, between the handcuffing and the end of the witness' testimony that he was in custody, but there is no evidence of any threats or any

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promises. It's clear the defendant was advised of his rights and that he understood them, but in spite of this witness' telling him, "You know, I don't want you to talk with me. You have requested an attorney," the evidence up to this point indicates an insistence of some kind of informal conversation short of any kind of interrogation and I don't know what the testimony regarding Mr. Rainey or, Trooper Rainey will be, but as I have indicated, I know there are cases that indicate that a witness — or, the defendant, once advised of his rights, can change his mind. The police cannot persuade him to change his mind — subtle-type things — and then there are some cases like — I think one of them was *Garrison, State v. Garrison* [16 Or. App. 588, 519 P.2d 1295 (1974)] and *State v. Suggs* [13 Or. App. 484, 511 P.2d 405 (1973)] —

MR. GROVE: The most recent —

THE COURT: — one was out of Washington County —

MR. GROVE: The most recent one I could find, your

Honor, was *State v. Holland* which is 48 Or. App. 367 [616 P.2d 1211 (1980)].

THE COURT: But, anyway, I am assuming that you are going to be proceeding to show or attempt to show that this case falls within one of those exceptions.

MR. GROVE: That's correct, your Honor.

THE COURT: And if you — the question is then can you or will you be unable to and —

MR. GROVE: That's —

THE COURT: — for that reason I will overrule the

[30]

objection and you may cross-examine the witness.

Q BY MR. BASSETT: All right. I understand the rule, but I don't agree with it. Very well, your Honor. Officer, I want to ask you first — it was a little confusing to me — of your position with respect to why you took — invited — you didn't drag him — invited the defendant to the police station.

A Why did I?

Q Yes.

A I wanted to get a statement that I could retain at an area that would be of — a secluded area where I could get a taped statement. We had gone through the incidents up there at the cabin with Mr. Bradshaw and he had told me about essentially the assault and what had happened and there were several names involved, the time lapse and whatnot. I was trying to write down notes and whatnot

and the Rockaway Police Department for me was the nearest place that would be adequate, have facilities, would be quiet and I could get a taped statement of the incidents that had occurred and be as correct as possible with my investigation.

Q Okay. You are explaining the surrounding — I am asking you: How did you view Mr. Bradshaw?

A As a possible suspect.

Q In which crime?

A In the fatal accident.

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Q Did you inquire about him furnishing beer to Mr. Reynolds?

A There had been some talk about that earlier.

Q Where did Mr. Reynolds work?

A At Downie's — at the grocery store in Rockaway.

Q Did you determine that Mr. Bradshaw bought the beer from Mr. Reynolds?

A No, I did not.

Q Okay. Did you know that Mr. Reynolds sold beer in that store?

A No, I did not. He's a butcher, I believe.

Q Yes, he was. Yes, he was, but it's a small store —

A Uh-huh (Yes).

Q — and they kind of trade off. If two employees are gone, they exchange duties. Did you not know that Mr. Reynolds sold beer there?

A I did not know he did.

Q Okay. Now, please explain to me — I am a little confused — about your language on the first paragraph. You say,

"It's just a formal investigation."

Now, those kind of contradict each other. Did you mean, "It's just an informal . . ."? They are your words.

A In my words it was not an interrogation and it was not an idle conversation. It was an inquiry into the facts and I was not interrogating him as a suspect and it was an inquiry into the facts that had occurred the night before and up to that

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point. To me that would be more or less a formal but not an interrogation but more of a formal conversation.

Q Why did you start at the beginning then of reminding him that he had certain rights? You wouldn't do that in a conversation with him, would you?

A I wanted to be sure to cover every possible angle and that at some point he may have said something that may have incriminated him, you know. Being somewhat familiar with the law but not an expert, I wanted to be sure that I covered every angle. It's our policy that whenever we do interview an individual on a serious or possible serious nature [*sic*] like this, that his rights are made available.

Q But you said —

A I did it —

Q Go ahead. Don't let me interrupt.

A I did it to be more than fair or to make sure that there was no question about what we were doing there.

Q Okay. Officer, I am not questioning your fairness.

A Yeah.

Q I am questioning what we say in the law — was he a focal suspect?

A No, he was not a focal suspect.

Q You know your *Miranda* and *Escobedo*.

A Uh-huh (Yes).

Q Was he a focal suspect?

[33]

A No. Had he been a focal suspect, I would not have advised him that he was free to go.

Q Well —

A The definition of "focal" — he was being looked at as possibly involved in a crime, but up to that point — in fact, I did not charge him with the crime of Manslaughter until the next day. He was charged with — I had not yet felt in my own mind up to that point, based on the evidence that I had, to make the charge.

Q But you on the very first page — I am not arguing with you, Officer. On the very first page you were advising him of his rights.

A That's correct.

Q Would you do that if he weren't a focal suspect, if you are just having —

A I was conducting an interview. Yes, probably on nearly all cases.

Q One last thing on that item. When you said, "It's just a formal . . .", did you mean "just" or "formal"?

A Just a formal.

Q You would think "just" would go with "informal", wouldn't you?

A Well, depending on who is looking at it, yes. To me, my words, it was just a formal.

* * * * *

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* * * * *

Q And now — we always say one more thing. Maybe less. On the last page: "And I do want an attorney before it goes much further." Okay. You were here. This is your own report.

A Yes.

Q "A And this is one rap I won't . . ." — he says,

". . . I won't take.

Q Okay.

A Inaudible.

Q At this point there's — since you requested an attorney, we will conclude this investigation. All right. Not the investigation, but the interview."

Now, that did occur, didn't it, Officer?

A Yes, it did.

* * * * *

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* * * * *

[December 10, 1980]

WILLIAM C. RAINEY, a witness called on behalf of the State, having first been duly sworn, was examined and testified as follows:

THE COURT: Please take the stand.

DIRECT EXAMINATION

BY MR. GROVE:

Q Could you state your full name and spell your last name for the record, please.

A William C. Rainey, R-a-i-n-e-y.

Q And could you tell the Court how it is that you are employed.

A I am employed by the Oregon State Police.

Q And how long have you been with the State Police?

A A little over twelve years.

Q Okay. Could you explain for the Court briefly what your main duties are with the State Police at this time.

A I am a polygraph examiner.

Q All right. And in that capacity did you ever have occasion to come into contact —

MR. BASSETT: I didn't hear his answer.

[42]

THE WITNESS: I am a polygraph examiner.

MR. BASSETT: Thank you.

Q BY MR. GROVE: In that capacity did you ever have occasion to come into contact with James Bradshaw?

A Yes, I did.

Q And is that the person seated to my immediate right here?

A Yes, it is.

Q Do you know approximately when it was that you came into contact with him?

A I believe it was September 15th in the late morning hours.

Q Okay. And where was it that you came into contact with him?

A Here at the courthouse.

Q All right. What had caused you to come into contact with him?

A I had been requested through the Tillamook office of the State Police to come to Tillamook and administer a polygraph examination to Mr. Bradshaw.

Q Okay. Was Mr. Bradshaw in custody at that time?

A Yes.

Q Okay. In the Tillamook County Jail?

A That's correct.

Q All right. Did you, in fact, proceed to administer a polygraph examination to him?

A Yes, I did.

[43]

Q Okay. Prior to that time — well, let me ask you this: Where were you when you gave him the examination?

A In the jury room adjacent to the courtroom.

Q Was anybody else with you?

A No.

Q Okay. Were you armed at that time?

A Sir?

Q Were you armed? Did you have a weapon?

A I don't believe so.

Q All right. Prior to Mr. Bradshaw taking a polygraph examination, did you make any threats, promises, or inducements to him to either take the exam or to tell the truth?

A No, I did not.

Q Prior to the time that you administered the examination to him, did you advise him of his rights?

A Yes, I did.

Q And did you have him sign any kind of a form?

A Yes, I did.

Q All right.

THE CLERK: State's exhibit number three marked for identification.

(State's Exhibit number three marked for identification.)

MR. GROVE: May I approach the witness, your Honor?

THE COURT: Yes.

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Q BY MR. GROVE: I want to hand you State's Exhibit number three and ask if you can identify that.

A Yes. This is the advice of Rights statement form that I read to Mr. Bradshaw and after each one I checked off the particular right, showed it to Mr. Bradshaw, which he read and signed his name to.

Q All right. There are a number of rights on that form. Did you inquire of him individually of each one?

A Yes, I did.

Q And did he appear to understand those rights?

A Yes, he did.

Q Did he appear to voluntarily talk to you and make the —

MR. BASSETT: If it please your Honor, before he examines him on that instrument, may I see it —

THE COURT: Yes, you may.

MR. BASSETT: — before he —

THE COURT: You may approach the witness.

MR. BASSETT: — before he has identified it? Shall I —

THE COURT: You may approach the witness and look at it. In fact, if you want to return to counsel table, you may.

MR. BASSETT: Thank you.

(Counsel approaches witness.)

MR. BASSETT: Thank you, Officer.

Q BY MR. GROVE: As I understand it, you went over each one

[45]

of those rights with the defendant; is that correct?

A Yes, sir.

Q Individually?

A Yes.

Q All right. And did the defendant sign that document in your presence?

A Yes, he did.

Q All right. You indicated that you went ahead and gave him a polygraph examination; is that correct?

A Yes, I did.

Q And after administering that examination, what occurred?

A I had cause to discuss the matter further with Mr. Bradshaw.

Q All right. Did you advise him of his rights again or did you —

A No, I did not.

Q Okay. Would you tell the Court what it was that you discussed with Mr. Bradshaw after the exam.

A I explained to Mr. Bradshaw that it was my opinion that he was not being truthful regarding having driven that vehicle. At that time Mr. Bradshaw told me that he now wished to tell the truth about it. He stated essentially that on that particular day, prior to Mr. Reynolds arriv-

ing, he had consumed a quantity of Olympia beer, sixteen ounce cans, and that after Mr. Reynolds arrived he stated that he himself, Mr. Bradshaw,

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went to a liquor store which was apparently close to where they resided and purchased a full fifth and a full pint of Black Velvet Whiskey. He stated that he returned to Mr. Reynolds there at the cabin and that they consumed this fifth and pint together and after having done that, Mr. Reynolds advised Mr. Bradshaw of a party somewhere in the Astoria area and asked if Mr. Bradshaw would like to go along. Mr. Bradshaw stated essentially that he asked Mr. Reynolds if there would be girls at the party. Mr. Reynolds said, "Yes," there would be all kinds of girls and then they left the premises. Mr. Bradshaw told me that he drove because he thought he was in better shape than Mr. Reynolds was. They were proceeding north on Highway 101 and after proceeding — Mr. Reynolds had told him that after proceeding about six miles up the road he was to ask him where to turn and he stated that he never did ask him where to turn because he never got that far. He stated that prior to this six mile area he had passed out and became involved in the accident. He felt that at the time of the accident Mr. Reynolds may have already passed out due to the fact that his speech was slurring and the sounds, the general sound of his voice. He thought that Mr. Reynolds had passed out already. The last thing he

remembered before passing out was that it became black and that the only conversation he could recall was that they were still talking about the girls that would be at this party. After the accident he recalled

[47]

only being injured and that he had lifted his T-shirt up to the back of his head — his head and with his hand had covered the wound that he was bleeding from. He could not recall how he got home, but he stated that he believes or is sure that he had knocked on granny's door — and I am not quite sure who granny is — and essentially that is it.

Q Had you heard anything about granny prior to this time?

A The only thing that I had heard prior was the earlier statement that he had given regarding the incident, but he had told me that the reason that he came up with these names of the people that were to have assaulted him earlier in his original story was he had heard granny talking about them. He said he didn't know them, but he had heard about them through her.

Q Had you heard anything about granny from other police officers prior to that time?

A I don't recall. If I did, it was nothing that I took —

Q Okay.

A — in a statement.

Q Prior to the time that you administered the exam-

ination, did he give you the same story about being assaulted by some people; is that what —

A Yes, he did.

Q All right. Did he indicate that he passed out because he had too much to drink; is that what you said?

[48]

A Yes. I asked him, "Did you pass out because you were drunk?" and his answer was, "Yes."

Q Okay. Did he know what had happened to Reynolds?

A Pardon?

Q Did he know what had happened to Reynolds?

A No, he did not.

* * * * *

[52]

* * * * *

CROSS-EXAMINATION

BY MR. BASSETT:

Q Mr. Rainey, during the examination at the pre-trial I had never talked with you. You had never heard of me or —

A Prior to the —

Q Prior to the pre-trial hearing.

A The preliminary hearing?

Q The preliminary hearing.

A I had not.

Q No. Now, I asked you three times at the preliminary hearing if you knew that the — that Mr. Bradshaw

had asked for an attorney and you said you never heard of it. Do you recall that?

A Yes, I do.

Q And you answered three times that you had never heard of it. If it please your Honor, I am now — I now move to strike all of the testimony of Officer Rainey* * *.

* * * * *

[54]

* * * * *

* * * My motion is based on the *Skelton* case [*State v. Skelton*, 41 Or. App. 497, 599 P.2d 1171 (1979)] and the *Brewton* case [*State v. Brewton*, 238 Or. 590, 395 P.2d 874 (1964)]. The *Brewton* case, which was decided in favor of the defendant, held that the — this kind of conversation with the defendant was impermissible. I am objecting further on the grounds that Mr. Bradshaw was asked if he would take a polygraph and he said, "Yes." Now it turns out that he was brought there to be interviewed with the view to making a confession. That has nothing to do with taking a polygraph.

* * * * *

[55]

* * * * *

* * * [H]ere is this Officer Rainey testifying to a confession made by a man who was only asked to take a polygraph and on those grounds, your Honor, I object to it.

THE COURT: Well, the way I understand this is that even if the — all of the testimony regarding the polygraph

were inadmissible, that in the event this man was fully advised of his rights pursuant to *Miranda* and if he has voluntarily changed his mind from the earlier time when he said, "I want an attorney and I don't want to talk about it," — if in the interim now he is re-advised, he voluntarily changes his mind, then the statement would be — could be admissible * * *.

* * * * *

[64]

* * * * *

* * * [A]s I summarize the sequence of events, first there was a conversation at the cabin. Then we moved to the police department where the defendant was, at the outset of the tape, advised of his rights. Then there was conversation regarding the matter. At the end the witness, Mr. Hays — Trooper Hays explained his theory of the case to the defendant and then again after — immediately after placing the defendant in custody he advised him of his rights. In fact, it should be noted that there had been an interruption in the taped conversation and when the tape was turned back on, the officer said, "We are at Rockaway P.D. and your rights and all those good things. You understand that?" And the defendant answered, "All right. Yeah," but the rights were read two times fully at that — on that day and the evidence shows there were no threats or promises or inducements to make statements at those times. Then on the way back into Tillamook

[65]

after the defendant was in custody there was further conversation and in the course of that conversation Trooper Hays mentioned that he could have a polygraph examiner come down and after the defendant learned what the nature of a polygraph examination was — I think the term "lie detector" was used — then he stated something to the effect, "I want to do what I can to clear it up." Lieutenant Winterfeld was called and apparently this witness came down the next day to administer the test. He again advised the defendant of his rights which would be the third full advice of rights. Again, the evidence shows there were no threats, promises, or inducements and then we arrive at the point where the officer told — or, explained to the defendant that in his opinion from the test, the examination, the defendant wasn't being truthful regarding driving and at that time the defendant said that he now wanted to be truthful about it and the one point I did miss is that at the conclusion of the taped conversation down at the Rockaway Police Station the defendant did say, "And I do want an attorney before it goes very much further," and that is when Trooper Hays promptly concluded the interview, although the evidence establishes that the defendant did continue to talk with Trooper Hays on the way in in spite of the Trooper's admonishing him that he would prefer not to talk with him, that he couldn't talk with him.

* * * * *

[69]

* * * * *

JAMES EDWARD BRADSHAW, a witness called to testify on his own behalf, having first been duly sworn, was examined and testified as follows:

MR. BASSETT: If it pleases your Honor, this witness is being offered in connection with this hearing and for that purpose only.

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. BASSETT:

Q Mr. Bradshaw, will you briefly recount the morning of September 15th, Monday morning —

A Yes, I will.

Q — with Officer Rainey and the polygraph.

A Well, I went downstairs with Officer Rainey to take the polygraph test and we sat there and went through the full polygraph test and after that I was sitting there and asked him how it worked and he said that he could read a polygraph test like I would read a comic strip and after that he said that it was either eleven — or, eleven minus, eleven plus or

[70]

eleven minus that he gave me —

Q Mr. Bradshaw, just a little louder.

A And he said that he had ways of proving that I was driving the truck that night.

Q What else did he say?

A He said that I wasn't telling the truth about it, that they had ways of breaking it down to prove that I was driving the truck —

Q Say that sentence a little louder so we can all hear it.

A He said that they had ways of breaking it down, that I wasn't telling the truth and that they had ways of breaking it down, that I was driving the truck on September 13th, the night of September 13th and that's — to the best of my knowledge, that's what we had talked about after the polygraph was taken.

* * * * *

[73]

WILLIAM C. RAINEY, a witness recalled on behalf of the State in rebuttal, having been previously sworn, was examined and testified as follows:

THE COURT: You are still under oath, sir.

DIRECT EXAMINATION

BY MR. GROVE:

Q You were present in the courtroom when Mr. Bradshaw testified; is that correct?

A Yes.

Q Was his testimony substantially the same as your recollection of the events as they occurred?

A With the exception of one point.

Q Which was what?

A The point that he states that I told him I would be

able to prove that he was driving the truck. Obviously I wouldn't be able to.

Q Okay. You didn't make that statement to him?

A No.

* * * * *

[75]

* * * * *

THE COURT: If I understand your testimony correctly, you deny you said anything about having ways to prove that he was driving?

THE WITNESS: Yes, I do deny saying that.

THE COURT: And you deny saying to the defendant that there were ways to break his story down or to break him down?

THE WITNESS: Yes, I deny saying that also.

* * * * *

[81]

* * * * *

THE COURT: All right. Well, I find that the statements made to Officer — or, to Corporal Rainey are admissible. The evidence establishes that there were no threats, promises, or inducements, that the defendant was properly advised of his rights and that he did understand them and I also find that the evidence supports a conclusion that although Mr. Bradshaw had indicated his intent to have an attorney before it goes very much further, that within a short time after he made that statement he was initiating conversations in spite of the

officer's replying to him, "I can't talk with you," and that I think that when I look at the total context of this, that there was, in fact, a change of this man's mind, that it was not brought on by any persuasion or argumentative kind of state-

[82]

ments that were improper in any way and that the statements finally made to Officer Rainey — or, to Corporal Rainey were voluntary and followed a waiver and a knowing waiver of his right to remain silent * * *.

* * * * *

Now, is there anything I have overlooked?

MR. BASSETT: You overlooked one thought I had, your Honor. I know better than to argue with the Court and I have no inclination to. I just want to sharpen my motion against

[83]

Officer Rainey's testimony. There would be no occasion for him to give a warning Monday morning at the polygraph. There would be no occasion for it.

THE COURT: Well, the testimony shows that —

MR. BASSETT: He agreed to take a polygraph, but there would be no reason for Officer Rainey to give him a warning. He was only there — he qualifies as a polygraph examiner and he was there for a polygraph. Now, if he is going to go away from the polygraph and interrogate him

for a confession, that isn't what the defendant went there for. I just want to get that into my motion.

THE COURT: All right. I did miss making a ruling on that and I don't find that there was an attempt to persuade or to talk him into making a statement. There was just a flat statement to the effect, "In my opinion you haven't been truthful regarding driving," and that there was — at that point the defendant said he wanted to be truthful now, that this was not, in effect, interrogation and I think that once a waiver occurred anyway, that that eliminates many of the problems, so I think that adequately discusses the issues and states the findings so that a reviewing court —

MR. BASSET: Thank you, your Honor.

THE COURT: — can review. * * *

PRETRIAL EXHIBIT 2[2] (TRIAL EXHIBIT 4)[3] TRANSCRIPT OF TAPE-RECORDED INTERVIEW

[September 14, 1980]

(Inaudible conversation while tape recorder being set up.)

CPL. HAYES: Okay, I'm going to set that right there. Jim, I want to advise your conversation being recorded on tape. [*sic*] Do you understand that?

JAMES BRADSHAW: Yes, I do.

Q Okay, and we'll have to talk loud, so . . .

A All right.

Q We can get recorded there. Okay, we're at the uh, Rockaway Police Department, and the time I have, according to my watch, is approximately 8:42. I might be a little bit fast. I'm going to . . . Okay, I'm talking to Mr. . . . (inaudible)

A JAMES EDWARD BRADSHAW.

Q James Edward Bradshaw, currently staying at his grandmother's?

A Yeah, right, the time being I . . .

Q Yeah, grandmother's place here in Rockaway.

A Uh huh.

Q And intends on going to 630 Tualatin, St. Helens, tonight.

A Yes.

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[2] *See* pp. 13-14, above; Tr. 19-20.

[3] Tr. 121-122.

Q Okay.

A Yes I do.

Q Uh, Mr. Bradshaw, I want to advise you that you don't have to talk to me. It's just a, it's a formal investigation, but you still have certain rights. And that you have the right to remain silent. Anything you say or do can and will probably be used against you in a court of law. You have the right

[2]

to have an attorney present while being questioned, and if you cannot afford an attorney and meet certain requirements set by the court, the court will appoint you one to represent you. Do you understand those rights?

A Yes, I do.

Q I'm talking to Mr. Bradshaw regarding two investigations, one involving an assault which he reported occurred to him last night, investigated by Officer Buxton and Rockaway Police Department; the investigation of a fatal accident which was discovered this afternoon, victim, last name is REYNOLDS, first name is LOWELL CLIFFORD, and the accident occurred on Hwy 101 near milepost 48. Do you understand what we're talking about here?

A Yes, I do.

Q Okay. Is the statements and the conversation having made with me, is it being made at your own free will?

A Yes, it is.

Q You're not under any duress . . .

A No (inaudible)

Q Or any threats or anything of that nature?

A No.

Q You voluntarily accompanied me down here to Rockaway Police Department?

A I voluntarily . . .

Q Okay.

A I'm willing (inaudible)

Q You're not in custody, do you understand that?

A All right.

Q You can, you have a right to leave at any time. Do you understand that?

[3]

A Yes, I do.

Q Okay, good. Have you been drinking today?

A Yes, I have.

Q Do you feel what you've had to drink? Are you under the influence?

A No, I'm not. I've only drank three, maybe four beers at the very most.

Q Okay.

A All four of them was 16 oz. containers of Olympia.

Q Uh huh. That's been all day long?

A All day long.

Q Okay, so you don't think that your judgment or whatever statement you make tonight is being affected by what you've had to drink?

A No, I don't.

Q Okay. Now, I want you to go through the events that happened yesterday, at uh, when you had contact with Lowell, when you first had contact with Lowell Reynolds, and what happened all the way through until you were contacted by Officer Buxton on the assault case, approximately 8:15. Can you tell me what time you first contacted Lowell yesterday?

A I contacted him at, let's see, he got off work at 5:00. I caught him coming home at 5:30, and I asked him if he wouldn't like to drink a little bit of whiskey.

Q Okay.

A He said yes, that it'd be all right for a little while, because, then he had to go call his girl friend, because he's supposed to meet his girl friend.

[4]

Q Do you know where his girl friend works?

A No, I didn't even know his girl friend, you know, last night was the first night I'd ever met her.

Q Okay . . .

A I'm presuming that was his girl friend, I'm not for sure.

Q Okay.

A You know. And, so I walked up the liquor store, and I picked up a pint and a fifth of whiskey, Black Velvet . . .

Q Uh huh.

A And wait, when I returned back up to my

grandma's place, well we waited for her to get home, because she'd went out for a ride with one of her friends earlier.

Q Was that you and Lowell waited for her to get home?

A Yeah. Me and Lowell both sat there at Grandma's table and waited for her.

Q Uh huh.

A And then after she came home, well me and Lowell went over, and we was drinking some whiskey.

Q What time did she come home? Do you remember?

A I think it was shortly, just a little bit before 6:00.

Q Okay.

A (Inaudible)

Q So it hadn't been too long after you got there?

A No, it hadn't been too long after that. And we went over and we was . . .

Q Where did you go?

[5]

A Over to Lowell's, at Lowell's, were at the cabin right next to my grandmother's.

Q Okay, so your grandmother owned some cabins? Is that . . .

A Yes, she owns a whole lot up through there.

Q And Lowell rents one of them?

A Yes.

Q Is that Cabin #1?

A I, uh, I think so but I wouldn't swear . . .

Q Okay, it's the one right next to the house there.

A Yes.

Q All right.

A Right next to the house, the same one you guys . . .

Q Does Lowell rent that cabin with anybody else, or does he live by himself?

A He lives by himself as far as I know.

Q Okay.

A He pays $75 a month and that's where he stays, you know.

Q Okay.

A And, anyway we was, we was over there and we was drinking whiskey and everything. He went down to the phone booth to call his girl friend, but, I presume it was his girl friend that was there.

Q What time did he go down to call his girl friend?

A It was, I'd say at least 6:45, anyway, around ten till seven, somewhere right around in there, that he went down and called her.

[6]

Q Uh huh.

A And shortly about, after that, about 20-25 minutes later, well these two girls come up to the house.

Q Were they by themselves?

A Yes, they was, when they come in.

Q Okay, do you know their names?

A I know one of them is JULIE or JUDY one up at, the other one is, as I can recall I think her, I think she said her name was KIM or KIMBERLY, but I'm not . . .

Q Okay.

A I'm not really for sure now.

Q Was this the one you would identify as, you thought was her girl, was Lowell's . . .

A Was Lowell's girl friend, yes. Yes, I would.

Q Okay. Did he mention any time during the evening this was his girl friend?

A He said, well, all he said that he was going to go down to the phone booth and call his girl friend up.

Q Did he . . .

A That he had to go down and call his girl friend.

Q Uh hum.

A So he left me there at his apartment and . . .

Q How long was he gone?

A I'd say not more than 10 minutes.

Q Okay.

A You know. And he come back up, and we was setting there and we was listening to some rock and roll

[7]

music and looking at TV at the same time and drinking whiskey.

Q Uh huh.

A Then these two girls appeared, and I was, I was standing in front of a set of barbells or a hand barbell, you know, one that you can pick up and do whatever you want

to do it with[*sic*], and I was standing there talking to her. And then these two guys come in.

Q Now, who are these two guys?

A That's what I'm not really for sure.

Q Uh, you mentioned some names earlier who you thought . . .

A BASH is who I think it was.

Q Bash?

A Bash.

Q Would that be DAVID BASH?

A I, that's what I'm not for sure, because all I heard is, just before I got hit in the head, I heard somebody say, "Bash, don't do it." And then, that's when I lost everything.

Q Okay. How long had these two guys been there?

A Not more than 15 minutes, I think.

Q Okay . . .

A I'd say anyway, you know, that they hadn't been there no longer than 15 minutes at the time being.

Q During the period of time that uh, these two girls and these two guys were there, do you recall what, what happened when all, when all six of you were there. You had two guys, two girls, you, and Lowell. Were you just drinking whiskey or . . .

[8]

A All right, the two girls come in . . .

Q Uh huh.

A Shortly after Lowell come back from presumably calling this girl friend . . .

Q Uh huh.

A Well, these girls come in, and we was setting there, and we was chit chatting around and having a good time from what I thought. Then there was a knock at the door, and there was two guys that come in, and we was standing there, and this one, that I presumably take it for that it was Bash, said, "Well, I'm going to go over, and I'm going to do the old bitch in." And I go, "Who . . .

Q Now, who, who's he referring, yeah, who does he . . .

A Well (inaudible).

Q (Inaudible)

A I was sitting there, and I'm going, I was going, "Well, who's this old bitch that you, that you're saying?" And he goes, "IRMA STOCKDALE over there." And I go, "Over my damn, dead body," I said, "You're going to have to put me out before you do it." And evidently he took me at my word, because he busted my head open, he knocked me out.

Q Why was he going to do Irma in?

A Well, she, I guess he used to live there, or something, and he owes her $300. And I guess that she was going to garnishee his wages or something.

Q Uh huh.

A You know, I'm not really for sure what, what the deal is between him and her. But, anyway right there at

the last, just before I got hit, I heard somebody holler out, "Bash, don't do it,"

[9]

Q Um hum.

A And then shortly after that, while I was out, and I went to Tillamook up there at the hospital, and the doc up there told me that if it would have been just a little bit harder of a blow, it, it would have cracked my skull.

Q Uh huh.

A Then . . .

Q Where's you get hit now?

A Right . . .

Q Okay, I can . . .

A There.

Q Right in back of the head there, okay.

A I got hit in the back of the head, and I tell you, I still don't know what I, where I (inaudible)

Q Clear down here, almost level with your ears, right . . .

A Yeah.

Q Just above the ears, there.

A Yeah, just, just above, probably about right in the middle, you know. I haven't ever looked at it yet.

Q Yeah.

A You know, I really . . .

Q Do you have any idea what you were hit with?

A I think it was tire iron[*sic*].

[10]

Q Un huh.

A You know, but I'm (inaudible)

Q What makes you think that?

A Well, I'm going from what the doc told me last night.

Q Uh huh.

A You know, I got the slip of paper or whatever you call it that the doctor writes out, you know . . .

Q Uh huh.

A And he circled it, and he, he told me to look out for, if I started bleeding out of the ears, or if liquid, clear liquid started coming out of it, he said for me to get back up there, because I had some type of thing that was going on with me.

Q Uh huh.

A I forget what he called it, you know, he used great big old long words.

Q Uh huh.

A And I'm a school dropout, so I'm not fairly used to them.

Q Well, I don't think even those of us who go to school understand those words.

A Yeah, he told me, he said, "If you have any problems at all, like stiffening in your neck, or getting dizzy, or blacking out, and feel like going to sleep," he said, "if you got somebody around you, have them wake you up, one, one to two hours apart all night long," you know, because

he didn't want me to go to sleep and going into a coma.

Q Uh huh.

[11]

A You know, I guess it, it was that bad.

Q Okay. When did you contact Officer Buxton?

A I didn't. There was a guy there . . .

Q At the hospital?

A No, the, the officer, this uh , Larry uh, what the hell was his last name, MOOREHEAD, I think it was, I'm not really for sure. He's an older feller, and he was staying up there with Granny. That's who she took the ride with earlier. And he called a cop, and then this officer here, he took and called the ambulance.

Q Okay so . . .

A From what I, from what I understand . . .

Q You were let, now how did you, did you walk over to your grandmothers's place, or did they . . .

A No, from what, from what my grandmother tells me, I walked right outside the door, and I fell on the ground. And that's where I was.

Q Who discovered you there?

A Well, she said that she was sitting there and she'd seen Lowell go running up, so she sent this Larry Moorehead, or (inaudible) . . .

Q She saw Lowell go running by?

A Yeah, Lowell went, she said Lowell went running by, and he wasn't wasting no time going by.

Q Which way was he running?

A He was running right up the street to the apartment right, you know, all the way down, you know.

Q Hum. So, He'd be running towards the hills or (inaudible) . . .

[12]

A Yeah, you know, where they're doing all that logging stuff up there. He went running towards that way.

Q So she thought something was the matter?

A Yeah, so she sent that Larry out there, and he come out there and looked at me. And I had a red shirt on last night, and, it's pretty well bright red one . . .

Q Un huh.

A But it was soaked with blood and this Larry . . .

Q Where's that shirt right now?

A It's laying upstairs back there at my granny's, you know.

Q Okay. Uh huh.

A When we go back there, I'll give it to you, you know . . .

Q Okay.

A And you can see what it looks like and stuff.

Q You know, you know what your blood type is?

A No, I'm not really for sure.

Q Okay.

A You know, I've had a few transfusions, but I don't know what that does either, you know, I don't know if they have to use the same blood or what, you know, I just . . .

Q Uh huh.

A And stuff. I tell you, I really don't know what, what went on last night.

Q So, from the point that you were hit you were knocked out (inaudible) . . .

A I was unconscious, and . . .

[13]

Q When you came conscious there was nobody around?

A When I came conscious I was laying in the back of the ambulance.

Q Oh, Okay.

A And I grabbed ahold of the ambulance driver, and I go, "Well, where we going?" Not the driver, but the guy that sets in back with you . . .

Q Uh huh.

A You know. I go, "Where we going?" and he goes, "You're going to go to the hospital. I just want you to lay down and be calm about it," because he said, "You got a very, very bad cut on the back of your head."

Q Uh huh.

A And, I don't know . . .

Q (Inaudible)

A You know. From there, from the time I was hit in the head in Lowell's place, I really don't know what went on, you know.

Q Okay.

A That's the reason why I asked, you know . . .

Q Yeah.

A That, I need a couple of days to think things over.

Q Sure. Now, do you uh, remember some beer that was there, uh, you said that was drank last night, where did this beer come from?

[14]

A The Olympia beer that was there? I went down to the store . . .

Q There was a Schlitz and there was an Oly.

A There was a Schlitz?

Q Yeah, Schlitz bottle sitting on . . .

A I don't know where the Schlitz come from, because I drink Olympia myself.

Q Uh huh. Did you buy . . .

A And . . .

Q Buy some . . .

A Yes. I went down to the store earlier that day, around about 4:00 or 4:15, and I picked up a six-pack of Olympia. And I was sitting there drinking it, and then when Lowel' got off work, I asked him if he wouldn't like a beer, and he goes, "Yeah," and we got sitting over there and got talking about whiskey . . .

Q Uh huh.

A And stuff, and I asked him if he felt like drinking a little bit of whiskey, and he said yes. So that's when I went down to the liquor store and bought a fifth and a pint.

Q Uh huh.

A (Inaudible)

Q Do you know how old Lowell is?

A I think that, I'm not really for sure, but I think he said he was only 20 years old.

Q Yeah. That's how old he is.

A You know, and that's the reason why I asked the officer there that, if there'd be any charges brought against me, you know, for buying a minor alcohol.

[15]

Q This is possible.

A (Inaudible)

Q It's very possible.

A If it is, I'm willing to face them, you know.

Q Okay. Well, we'll work with that later, all right?

A I mean because . . .

Q The thing is we want to determine exactly what happened last night. So, in going over your mind, as best you can remember, the people that were in the apartment at the time you got hit on the head was Lowell . . .

A Uh huh.

Q A girl named Julie or Julia, something like that . . .

A Judy or Julie.

Q Judy, another girl who you thought's name was Kim . . .

A Or Kimberly.

Q Or Kimberly, who you assumed was his girl friend . . .

A Uh huh.

Q And two other men, one who you assume by the name of Dash?

A Yes.

Q And . . .

A That's what I heard just before I got hit, somebody hollered out, "Bash, don't do it."

Q Okay, and what about, did the other guy ever identify himself?

A The other guy, I never heard his name, I never even met him, you know, they just walked in and . . .

Q Uh huh.

[16]

A And I had Lowell, he was setting here in the chair, and this girl was setting up on the arm of it, and then there was this guy setting over, and then Bash is next door here, and this Julie or Judy, whichever one that she is, was setting on the bed, and I was standing in front of her, in front of the bellbars[*sic*].

Q Okay. Now, do you remember what time they came again?

A I'm, I'm not really for sure. I'd say it was around 7:00 or 7:30 . . .

Q Okay.

A When they come in, you know, (inaudible)

Q And the officer, or, uh, he arrived at 8:15. Okay.

A That's what he told me earlier, that that's when he arrived out of his report.

Q Uh huh. Okay. Do you know what kind of rig that Lowell drives?

A Lowell drived a, I think it was a '71 Ford Courier or Corrier . . .

Q Yeah.

A Whatever that . . .

Q Do you remember what color it was?

A It was pure white.

Q Okay. Do you know how long he'd had that rig?

A Well, he'd had a '63 Chevrolet Impala, and he was telling me last night that he just traded in, so I would imagine he probably had it probably about a month. He said something about that he was still making payments on it.

Q Uh huh.

A You know, so . . .

[17]

Q Have you ever ridden in that rig?

A No I haven't, Lowell, last night, well I'd met him last weekend, last Saturday night . . .

Q Uh huh.

A I met Lowell. That's when my cousins had brought me down . . .

Q Uh huh.

A To Grandma's, granddaugther, you see, I'm not really Grandma's grandson . . .

Q You just call her Grandma.

A I call her Grandma, you know . . .

Q Uh huh.

A Because it, it helps her out and stuff. And they'd brought me down here, and we got ready to pull out Sunday morning, and she asked me if I couldn't stay around because she thought that there was people around snooping around her and breaking into her house and stealing this and stealing that, you know . . .

Q Uh huh.

A Which things has come up missed and have been returned.

Q Uh huh.

A So I was staying there, and then last night was the second time I met Lowell.

Q Okay.

A You know, so I . . .

Q So you'd never had an opportunity to go for rides with him?

A No. He asked me last night if I wanted to go for a ride, and I go, "Naw, I think I better stay here since I've been drinking this much," you know.

[18]

Q Uh huh. Have you, do you have a driver's license in Oregon?

A No, I haven't, haven't a driver's license because I've been, I'm an habitual traffic offender.

Q Okay, so you (inaudible) . . .

A (Inaudible) black ice, and I run an officer off the

road, State highway patrolman off the road. But I got this ID card here.

Q Okay.

A (Inaudible)

Q You're a habitual in the state of Oregon?

A Uh huh.

Q Okay, how long . . .

A Outside Oregon I can drive.

Q Yeah. How long have you been suspended in Oregon as habitual offender?

A I'd say it was, 26, not really for sure, but I think Judge Donald Kalberer, down there in Columbia County, typed in a, suspended me the 26th of December of '79.

Q (Inaudible)

A I'm pretty sure that's when he did it.

Q Ten years?

A Yeah.

Q Okay.

A For ten years.

Q And that's why you don't drive?

[19]

A Yeah.

Q Okay.

A (Inaudible) I respect the law enough that I don't want to drive.

Q Uh huh.

A Yeah. I tried it before and I've got, I've been (inaudible) for several tickets and stuff and (inaudible)

Q Okay.

A And then when they made it mandatory for, for your damned insurance in Oregon, which I'm glad that they did, but, I have never bothered driving since then, you know, I haven't even bothered trying to buy a car.

Q Uh huh. Okay. Is there anything else that happened this evening that uh, or happened yesterday evening that you happened to think about?

A Nothing that I know of, only that me and Lowell was partying last night, you know.

Q Uh huh. Partying pretty heavy, huh?

A Well, not, not what . . .

Q Well . . .

A You really call heavy . . .

Q (Inaudible) well, a fifth and a . . .

A We was setting around.

Q Pint of Black Velvet and some beer would be . . .

A Yeah.

Q To me would be pretty heavy.

[20]

A Well, yeah.

Q Maybe not to you, but to me.

A I guess it would be, really, you know . . .

Q Between the two of you.

A But other than that . . .

Q How much did those other people drink?

A Well, the girl I was talking to, she was, she was taking her good share out of the bottle, and uh . . .

Q Uh huh.

A I mean, she'd just tip it up and "gluck, gluck" [*sic*] a couple of times and . . .

Q Do you feel that you, you were pretty (inaudible)

A I feel I had a pretty good . . .

Q (Inaudible) buzzing

A Head going last night, you know.

Q Okay, then you got hit on the head, and that made things worse, huh?

A Yeah, it did, because when the doc up there was going to sew me up, I told him I didn't need by head numb because I was already numb enough, you know.

Q Uh huh.

A 'Til after he went to stick that needle in my head, and that . . .

Q Made (inaudible)

A That's when I say, "Hey, why don't you deaden that thing back there a little bit," you know . . .

Q Uh huh.

[21]

A Him himself, he thought that I'd had a little bit too much to drink, you know.

Q Do you remember what doc treated you?

A Uh, not right off, I don't. I got the paper at home with his . . .

Q That's all right, yeah.

A Names and stuff on it. I'll, I'll give it to you and the shirt both, you know.

Q Uh huh.

A If I can help you guys out any, you know, because . . .

Q Sure.

A I want to help you guys out as much as anything because . . .

Q Well, we're just trying to determine what happened last night, you see.

A I think that there was foul play somewhere.

Q What makes you think that?

A I don't know. Why would, why would Lowell split out of his own apartment, take off running up, running up between the apartments like he's a bat out of hell?

Q I don't know either (inaudible)

A Why didn't he go out and get in his truck and take off in his truck?

A (Inaudible)

A I figure that since, that they was going to go over and do whatever they had planned in their head to do to Granny over there.

Q Uh huh.

A I figured when they hit me in the head, you know, I, I don't want to say for sure, but I think that it

[22]

was Lowell that har-, hollered it out, "Bash, don't do it." And then that's when I lost everything.

Q Uh huh.

A But I think what they thought is that they killed me last night. Because the doctor said, you know, just like the doctor said, I said it earlier too, he said if there had been very much harder of a blow, it would have cracked my skull.

Q Uh huh.

A Anyhow, that's the reason why when the city officer come up here, and he told me they'd found Lowell's pickup over an embankment and he was dead.

Q Uh huh.

A Damn, I don't know. I, I really don't know. I really don't.

Q Well, that's what we doing, you know, is trying to find out what did happen.

A I hope to hell that, that if somebody did run him off the road and kill him on purpose, I hope that they hang.

Q Uh huh. Well, if they did, then hopefully we can catch them and due justice will be served.

A I hope so. I don't mean just go into a damned insane asylum or something for a year or anything, because Lowell was one decent guy. He was a decent guy. He was a butcher down here at this store, and . . .

Q Uh huh.

A He'd do damned near anything for my granny.

Q Uh huh.

A He'd bring her food home to her, so she wouldn't have to go up to the store or anything else, you know.

Q Yeah. Pretty good to her then?

[23]

A He was a damned sweet guy. You know, I'm not saying because I'm queer or anything like that, I'm just saying because I think he was a decent guy.

Q Uh huh.

A Myself, I think that, I don't really know. It hurts me to even know that he got killed last night because I was, I was waiting around there all day long so he'd come home so I could really find out what was going on, because he was the only witness I got.

Q Uh huh.

A Because I don't, you know, I don't even know the two girls that was there, only by their first names. I don't know where they lived or nothing, you know.

Q Uh huh.

A And like I told you earlier, I'm from (inaudible), Missouri.

Q Uh huh.

A You know, that's a little over thirty-six hundred miles from here, so . . .

Q How long have you been back in Oregon?

A Well, I've been back here, let's see, August, let's see, it's September, right? No this is November. What is this month, anyway?

Q Uh, September 14th.

A Okay, I come back August 15th, so tomorrow I'll be here a month.

Q Uh huh.

A Been back in Oregon a month.

Q Okay.

[24]

A Yeah.

Q Did you plan on finding work back here?

A That's what I come out for is to go back to work, hopefully either on a ranch or else find sawmill work or something, you know. I just . . .

Q Are you trained at anything?

A I've got experience in sawmill work, and as a security guard.

Q Uh huh.

A I've worked as security guard, for King Security and Brown Security, down there in St. Helens, Columbia County. And stuff, you know, but.

Q (Inaudible)

I'm going to turn the tape recorder off for a minute, Jim.

A Okay.

Q Okay, I turned the tape recorder back on, Jim, do you understand that?

A Yes.

Q And I turned it off because we were talking, or I was talking to another (inaudible - telephone ringing) Okay, now, we'll try it again here, Jim.

A All right.

Q Tape recorder's back on, and we're at Rockaway

PD, and your rights and all those good things. You understand that?

A All right, yeah.

Q Okay.

[25]

A (Inaudible)

Q I'm going to throw something at you here, Jim, and I'm going to pitch a theory, and I'm going to tell you what I'm going to do. Right now I'm going to place you under arrest for furnishing liquor to a minor. Do you understand that?

A Yeah.

Q Okay. After placing you, you're no longer free to go. You're in custody.

A Okay.

Q Okay. Now, you have the right to remain silent. Anything you say or do can and will probably be used against you in a court of law. Do you understand that? You have the right to have an attorney present while being questioned. Do you understand that?

A Uh huh.

Q If you cannot afford an attorney and meet certain requirements set by the court, the court will appoint you one to represent you, do you understand that?

A Yes, I do.

Q Okay. We've contacted three out of the four people you indicated that was at the apartment last night. All of them have witnesses indicating they were not there. And

it's going to be my theory that you were driving that pickup, ran off the road because you had too much to drink, got scared because you—I'm just giving you my theory. You got scared because you're a habitual offender, and a result of that accident is how you hurt your head. Then you came back and called the police. This is my theory only. It may not be right, but I'm just telling you how I feel about it. Am I close?

A No. You're one hell of a long ways from it.

[26]

Q Okay. Were you in the vehicle last night?

A No, I was not.

Q Even as a passenger?

A I've got witnesses to that.

Q Okay, can you tell me who the witnesses were?

A For one, my grandmother and Larry Moron or Moorehead, whichever one his last name may be.

Q (Inaudible)

A And I do want an attorney before it goes very much further.

Q Okay.

A This is one rap I won't, I won't take . . .

Q Okay.

A (Inaudible)

Q At this point, there's, since you requested an attorney, uh, we will conclude this investigation, all right? Not the investigation, but the interview.

A Sounds fine with me, because this is one thing that . . .

Q Okay. I'm just . . .

(End of tape)

SENTENCE ORDER

[filed February 23, 1981]

IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF TILLAMOOK
[Title of case omitted in printing]

This matter came before the Court on February 17, 1981 for sentencing of the above-named defendant on a charge of MANSLAUGHTER IN THE FIRST DEGREE; DUII; DWS. The State appeared by Bradley C. Grove, Deputy District Attaorney. The defendant appeared in person and with Alton Bassett, attorney. The Court, having considered the matter,

NOW, THEREFORE, IT IS HEREBY ORDERED that on the charge of Manslaughter In the First Degree defendant is committed to the legal and physical custody of the Corrections Division for the State of Oregon for a period not to exceed seven years with a minimum period to serve of three years; IT IS FURTHER ORDERED that on the charge of DUII defendant is to serve five months and six days in the Tillamook County jail with credit for time served; IT IS FURTHER ORDERED that on the charge of DWS defendant is committed to the legal and physical custody of the Corrections Division for a period not to exceed three years, to be concurrent with the sentence in Count 1.

Dated February 23, 1981.

[Signature omitted in printing]

OPINION OF OREGON COURT OF APPEALS

[Opinion set forth in full as Appendix A, pages 10-13 of the printed petition for certiorari]

ORDER OF OREGON SUPREME COURT DENYING REVIEW

[Opinion set forth in full as Appendix B, page 14 of the printed petition for certiorari]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1857

STATE OF OREGON, Petitioner

vs.

JAMES EDWARD BRADSHAW, Respondent

On Petition for a Writ of Certiorari to
the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

GARY D. BABCOCK
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State v. Bradshaw, 54 Or App 949, 953, 636 P2d 1011, 1013 (1981)	4
Steagald v. United States, 451 US 204, 208-209 (1981)	3

QUESTION PRESENTED

Respondent submits that the question presented in this case is more accurately stated as follows:

> "Does a police officer violate the limits of custodial interrogation established in Edwards v. Arizona, 451 US 477 (1981) where he reinterrogates an arrestee concerning his culpability after the arrestee had previously invoked the right to counsel and asked the limited procedural question 'What is going to happen to me now?'"

OPINIONS BELOW
JURISDICTION
CONSTITUTIONAL PROVISIONS INVOLVED

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of these matters as supplemented and clarified by additional facts set forth in the argument below.

REASONS FOR DENYING THE WRIT

I.

THE PRESENT CASE DOES NOT PRESENT A SIGNIFICANT FEDERAL QUESTION. THE OREGON COURT OF APPEALS PROPERLY APPLIED THE STANDARDS ANNOUNCED IN EDWARDS V. ARIZONA, 451 US 477 (1981) TO THE LIMITED FACTS OF THIS CASE.

This case does not present a significant federal question. The constitutional standard for reviewing statements uttered after an arrestee's assertion of the right to counsel has been settled since Miranda v. Arizona, 384 US 436 (1966).[1] The standard was reconfirmed and clarified in Edwards v. Arizona, 451 US 477 (1981) as follows:

---

1. In Miranda, this Court announced the procedures to be followed when the person in custody asks to consult with a lawyer, as follows:

(Footnote continued on Page Two)

"* * * [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." 451 US at 484-485

There is no present conflict among the state or federal courts concerning the application of the Edwards holding.

The Oregon Court of Appeals properly applied the Edwards standard to this limited factual record. This Court should deny petitioner's request to re-examine the state court's factual determination and their limited holding, because this individual case will have marginal (if any) impact on cases arising in other jurisdictions.

The Court of Appeals' opinion provided:

Footnote 1 continued:

"If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

"This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time." 384 US at 474

"We do not construe defendant's question about what was going to happen to him to have been a waiver of his right to counsel, invoked only minutes before, or anything other than a normal reaction to being taken from the police station and placed in a police car, obviously for transport to some destination. Though a conversation ensued, the police officer clearly took advantage of the opening to reinterrogate defendant about his culpability and suggest the lie detector test, which was administered the next day.

"The administration of the lie detector test and the subsequent interrogation of defendant were not at his suggestion or request, but were at the instance of authorities. The *Edwards* court emphasized that

> "'it is inconsistent with *Miranda* and its progeny for authorities, *at their instance*, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.' (Emphasis supplied.) 68 L Ed 2d at 387.

"Thus, under the reasoning enunciated in *Edwards*, defendant did not make a valid waiver of his Fifth Amendment rights, and his statements were inadmissible."

Petitioner's three proposed reasons for granting the writ are impersuasive.

(1) Interrogation

Petitioner should be precluded from claiming the absence of interrogation for the first time in this Court, because it failed to raise and argue the issue in the Oregon courts. Steagald v. United States, 451 US 204, 208-209 (1981); Cady v. Dombroski, 413 US 433, 442 (1973).

Also, the record supports the state court's finding that respondent was interrogated after he invoked the right to counsel.

On September 14, 1980, Corporal Hays interviewed defendant at the city police station concerning his

alibi.[2] Hays asked respondent 90 questions concerning the details of his alibi, arrested him for furnishing alcohol to a minor, confronted him with his theory of respondent's culpability, and asked respondent for his reaction. (State's Exhibit No. 2 in trial file).[3] Minutes after respondent asserted the right to counsel, the police officer summarily reminded respondent of his rights, briefly answered a procedural inquiry, reiterated his theory of respondent's culpability, and suggested that respondent could take a polygraph examination to clear the matter up (Tr 22-25).

Respondent believes this repeated use of questions, confrontive assertions, and suggestions constituted interrogation "reasonably likely to elicit an incriminating response". Rhode Island v. Innis, 446 US 291, 300-301 (1980); Miranda v. Arizona, supra.[4]

(2) Police Initiated Interrogation

The Oregon Court of Appeals properly found that Corporal Hays initiated further interrogation minutes after respondent asserted the right to counsel. State v. Bradshaw, 54 Or App 949, 953, 636 P2d 1011, 1013 (1981).

2. Immediately preceding the station interview, Hays had contacted respondent near his residence, and questioned him about his knowledge of Lloyd Reynolds, the deceased, and respondent's whereabouts on the previous evening when Reynolds had died (Tr 14-15). Respondent maintained he had been with Reynolds and others at a party, that a third person assaulted him, knocking him unconscious, and he was not with Reynolds during the automobile accident (Tr 15). Based on certain inconsistencies in respondent's alibi, Hays asked him to accompany him to the Rockaway Police Station for a taped interview (Tr 16). Respondent complied (Tr 16).

3. Representative portions of the 26 page interview (State's Exhibit No. 2) are set forth as Appendix A.

4. Similarly, on September 15, 1980, State Police Officer Rainey administered a polygraph examination, accused respondent of lying, and questioned him to clarify his responses (Tr 43-48, 74-75). Rainey's remarks were also interrogation. Rhode Island v. Innis, supra.

Respondent believes his limited question about a procedural matter did not amount to a waiver and a request to reopen further interrogation as contemplated by this Court in Edwards v. Arizona, supra, 451 US at 484-485.

Post-arrest "administrative conversations" do not waive the right to counsel. In Oregon, state agents routinely converse with arrestees on procedural matters before one's summoned attorney arrives at the jail or before counsel is appointed at arraignment. "Administrative conversations" may occur in a variety of situations:

> (1) Conversations enroute to the station (e.g., discussion concerning safekeeping an arrestee's automobile, cancelling an appointment, or notifying a relative);
>
> (2) Conversations during booking procedures (e.g., intake interview, identification photographs and fingerprinting, search of person, exchange of clothes and property, inventory of property, and jail orientation rules);
>
> (3) Conversations during the taking of physical evidence (e.g., blood, breath or hair samples, or fingernail scrapings);
>
> (4) Conversations during an arrestee's interview with a security release officer in his application for release and for appointment of counsel, ORS 135.040 et. seq.; and
>
> (5) Conversations related to an arrestee's request for a telephone call to counsel, for medical assistance, or related requests.

Respondent believes his inquiry "What is going to become of me now?" was a limited "administrative question" and not a waiver of his right to counsel. The Court of Appeals correctly concluded that "the police officer clearly took advantage of the opening to reinterrogate defendant about his culpability and suggest the lie detector test" (54 Or App at 953, 636 P2d at 1013). The police officer -- not respondent -- initiated reinterrogation.

(3) Right to Counsel Standard

In its third theory, petitioner claims "the arresting officer's resumption of his conversation with the defendant in this case more closely resembles the non-coercive questioning of a properly advised defendant which was upheld in Michigan v. Mosley, 423 US 96 (1975), than the coercive tactics condemned in Edwards." (Pet. at 8).

Respondent perceives no conflict between Mosley and Edwards. In Mosley, an armed robbery suspect who was re-interviewed by police after once refusing to talk had merely invoked his right to remain silent, not his right to counsel. This Court has specifically adverted to this distinction, and the different rules which flow from it in Edwards, 451 US at 485, and in Mosley, 423 US at 102 n. 7. As stated in Edwards, "[T]he Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel * * *" (451 US at 484). Mosley does not aid petitioner in this case.

In summary, the police officer initiated re-interrogation of respondent after he invoked the right to counsel. Respondent did not make a valid waiver of his Fifth Amendment rights, and his statements were inadmissible.

CONCLUSION

The decision of the Court of Appeals of the State of Oregon was clearly correct, and the petition for the writ of certiorari should be denied.

GARY D. BABCOCK
Public Defender for Oregon
JOHN DAUGIRDA
Deputy Public Defender for Oregon
Counsel for Respondent

APPENDIX A

INTERVIEW BY CORPORAL HAYS OF RESPONDENT AT ROCKAWAY POLICE STATION ON SEPTEMBER 14, 1980, EXCERPT OF STATE'S EXHIBIT NO. 2 (SEE PAGE FOUR, ABOVE)

"Q. [CORPORAL HAYS:] I'm talking to Mr. Bradshaw regarding two investigations, one involving an assault which he reported occurred to him last night, investigated by Officer Buxton and Rockaway Police Department; the investigation of a fatal accident which was discovered this afternoon, victim, last name is REYNOLDS, first name is LOWELL CLIFFORD, and the accident occurred on Hwy 101 near milepost 48. Do you understand what we're talking about here?

"A. [RESPONDENT:] Yes, I do.

"* * * * *.

"Q. Okay. Now, I want you to go through the events that happened yesterday, at uh, when you had contact with Lowell, when you first had contact with Lowell Reynolds, and what happened all the way through until you were contacted by Officer Buxton on the assault case, approximately 8:15. Can you tell me what time you first contacted Lowell yesterday?

"* * * * *.

"Q. During the period of time that uh, these two girls and these two guys were there, do you recall what, what happened when all, when all six of you were there. You had two guys, two girls, you, and Lowell. Were you just drinking whiskey or . . .

"* * * * *.

"Q. The thing is we want to determine exactly what happened last night. So, in going over your mind, as best you can remember, the people that were in the apartment at the time you got hit on the head was Lowell . . .

"* * * * *.

"Q. Okay, and what about, did the other guy ever identify himself?

"* * * * *.

"Q. Uh huh. Have you, do you have a driver's license in Oregon?

"A. No, I haven't, haven't a driver's license because I've been, I'm an habitual traffic offender.

"Q. Okay, so you (inaudible) . . .

"A. (Inaudible) black ice, and I run an officer off the road, State highway patrolman off the road. But I got this ID card here.

"Q. Okay.

"A. (Inaudible)

"Q. You're a habitual in the state of Oregon?

"A. Uh huh.

"Q. Okay, how long . . .

"A. Outside Oregon I can drive.

"Q. Yeah. How long have you been suspended in Oregon as habitual offender?

"A. I'd say it was, 26, not really for sure, but I think Judge Donald Kalberer, down there in Columbia County, typed in a, suspended me the 26th of December of '79.

"* * * * *.

"Q. I'm going to throw something at you here, Jim, and I'm going to pitch a theory, and I'm going to tell you what I'm going to do. Right now I'm going to place you under arrest for furnishing liquor to a minor. Do you understand that?

"A. Yeah.

"Q. Okay. After placing you, you're no longer free to go. You're in custody.

"A. Okay.

"Q. Okay. Now, you have the right to remain silent. Anything you say or do can and will probably be used against you in a court of law. Do you understand that? You have the right to have an attorney present while being questioned. Do you understand that?

"A. Uh huh.

"Q. If you cannot afford an attorney and meet certain requirements set by the court, the court will appoint you one to represent you, do you understand that?

"A. Yes, I do.

"Q. Okay. We've contacted three out of the four people you indicated that was at the apartment last night. All of them have witnesses indicating they were not there. And it's going to be my theory that you were driving that pickup, ran off the road because you had too much to drink, got scared because you--I'm just giving you my theory. You got scared because you're a habitual offender, and a result of that accident is how you hurt your head. Then you came back and called the police. This is my theory only. It may not be right, but I'm just telling you how I feel about it. Am I close?

"A. No. You're one hell of a long ways from it.

"Q. Okay. Were you in the vehicle last night?

"A. No, I was not.

"Q. Even as a passenger?

"A. I've got witnesses to that.

"Q. Okay, can you tell me who the witnesses were?

"A. For one, my grandmother and Larry Moron or Moorehead, whichever one his last name may be.

"Q. (Inaudible)

"A. And I do want an attorney before it goes very much further.

"Q. Okay.

"A. This is one rap I won't, I won't take . . .

"Q. Okay.

"A. (Inaudible)

"Q. At this point, there's, since you requested an attorney, uh, we will conclude this investigation, all right? Not the investigation, but the interview.

"A. Sounds fine with me, because this is one thing that . . .

"Q. Okay. I'm just . . .

"End of tape."

Office - Supreme Court, U.S.
FILED
JUN 23 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1857

STATE OF OREGON, Petitioner

vs.

JAMES EDWARD BRADSHAW, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, James Edward Bradshaw, now residing at Oregon State Penitentiary, Box 43248, 2605 State Street, Salem, Oregon, asks leave to file the attached brief in opposition to the Petition for Writ of Certiorari filed by the State of Oregon on April 5, 1982, to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on December 1, 1981, without prepayment of costs and to proceed in forma pauperis. The respondent's affidavit in support of this brief in opposition is attached hereto.

GARY D. BABCOCK
Public Defender for Oregon
JOHN DAUGIRDA
Deputy Public Defender for Oregon
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1857

STATE OF OREGON, Petitioner

v.

JAMES EDWARD BRADSHAW, Respondent

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, James Edward Bradshaw, being first duly sworn according to law, depose and say, in support of my application for leave to proceed without being required to repay the costs or fees:

1. I am respondent in the above entitled case.

2. Because of my poverty I am unable to pay the costs of said cause, and still provide myself with the necessities of life.

3. I am unable to give security for the same, and still provide myself with the necessities of life.

4. I believe I am entitled to the redress I seek in said cause.

5. I am unable to obtain from the court below a certified copy of the record without payment of fees and costs.

6. I was charged in Tillamook County, Oregon, with manslaughter in the first degree, ORS 163.118, driving while under the influence of intoxicants, ORS 487.540, and driving while revoked, ORS 487.560. I was tried and convicted of all charges in a trial before the court. The Tillamook County

Circuit Court imposed a seven year sentence with a three year minimum term for manslaughter, a concurrent three year term for driving while revoked and a five month and six day jail sentence for driving while under the influence of intoxicants. I appealed these convictions to the Court of Appeals of the State of Oregon, which reversed and remanded for a new trial. 54 Or App 949, 636 P2d 1011 (1981). The Supreme Court of the State of Oregon denied the state's petition for review, 292 Or 568, ___ P2d ___ (1982).

This brief in opposition is filed for the purpose of urging this court to deny the Petition for Writ of Certiorari sought by the State of Oregon.

James Edward Bradshaw
JAMES EDWARD BRADSHAW, Respondent

Subscribed and sworn to before me this 10 day of June, 1982.

D Lunwald
NOTARY PUBLIC FOR OREGON
My Commission Expires: March, 1984

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CLERK

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STATE OF OREGON,

Petitioner,

v.

JAMES EDWARD BRADSHAW,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does a police officer violate the limits upon custodial interrogation established in *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Miranda v. Arizona*, 384 U.S. 436 (1966), by reminding an arrestee who inquires, "Well, what is going to happen to me now?" of the arrestee's previously asserted request for counsel and resuming his conversation with the arrestee, after the arrestee acknowledges that he understands his rights?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Oregon Court of Appeals reversing Bradshaw's conviction (Petition for Certiorari, at 10-13) is reported at 54 Or. App. 949, 636 P.2d 1011 (1981). The order of the Oregon Supreme Court denying the State's petition for review of the decision of the court of appeals (Petition for Certiorari, at 14) is reported at 292 Or. 568, 644 P.2d 1129 (1982).

JURISDICTION

The decision of the Oregon Court of Appeals was entered on December 1, 1981. The Oregon Supreme Court denied the State's timely petition for discretionary review on February 3, 1982. The State's petition to this Court for a writ of certiorari was timely filed 60 days thereafter, pursuant to Rule 20.1, on April 5, 1982. The Court's jurisdiction is based on 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."

United States Constitution, Amendment XIV, § 1:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Bradshaw was convicted in an Oregon trial court of manslaughter in the first degree, driving while under the influence of intoxicants, and driving while his operator's license was revoked. His sole contention on appeal was that the trial court erred by admitting evidence of his statement to a state police polygraph examiner. In that statement Bradshaw admitted that he was the driver of the vehicle involved in the fatal accident which gave rise to the criminal charges. Bradshaw contended that the statement was obtained in violation of his rights under the Fifth and Fourteenth Amendments.

On the evening of Saturday, September 13, 1980, Bradshaw was found unconscious on the ground between a cabin occupied by Lowell Reynolds and the residence where Bradshaw was staying in Rockaway, Oregon (Tr. 134-135, 144).[1] Bradshaw had a large laceration on the back of his head. He complained of head and chest pains, and was extremely intoxicated (Tr. 135). He claimed that he had been knocked unconscious at a party in Reynolds' cabin and had found no one in the cabin when he regained consciousness (Tr. 135-136). He was taken to a hospital. The Rockaway police began

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[1]In this brief, "Tr." refers to the transcript of the trial court proceedings in this case; "J.A." refers to the joint appendix; and "Ex." refers to the transcript of Bradshaw's tape-recorded statement to Corporal Hays on September 14, 1980, Exhibit 2 in the pretrial proceedings and Exhibit 4 in the trial itself.

looking for witnesses to the alleged assault, including Reynolds (Tr. 136-139).

On the afternoon of the next day, September 14, Reynolds' body was found in his wrecked pickup truck (Tr. 85-86, 92). He had obviously been dead for some time (Tr. 107-108). From the position of the body, it appeared that Reynolds had been a passenger in the vehicle when it had left the highway, struck a tree and an embankment, and ultimately come to rest on its side, in a shallow creek (Tr. 86-87, 103-104, 108-110). The cause of his death was traumatic injury, coupled with asphyxia by drowning (Tr. 168-169, 171, 178).

That evening, in the course of his investigation into the accident, State Police Corporal Gerald Hays went to Reynolds' cabin, along with the Rockaway police officer who was investigating the alleged assault upon Bradshaw. At the cabin, they met Bradshaw and discussed both the accident and the alleged assault (J.A. 6-8; Tr. 13-14). Bradshaw's description of the events of the prior evening and the people allegedly present in Reynolds' cabin was not consistent with information the police received from others (J.A. 9-10; Tr. 15-16). Hays therefore asked Bradshaw to accompany him to the Rockaway Police Station to make a tape-recorded statement,

and Bradshaw did so willingly (J.A. 10-11; Tr. 16-17).

At the police station, Hays, who regarded Bradshaw as a "possible suspect," but not a "focal suspect," in Reynolds' death (J.A. 25, 27; Tr. 30, 32-33), advised Bradshaw of his *Miranda*[2] rights and the nature of the investigation he was conducting. Bradshaw acknowledged that he understood these matters and that he was free to leave (J.A. 45-47; Ex , at 1-3). He then stated that on the previous evening, he and Reynolds had been drinking in Reynolds' cabin. Bradshaw said that others had joined them, and he had been struck from behind by one of the later arrivals, after a heated exchange of words (J.A. 48-53; Ex., at 3-8). He admitted buying the beer and whiskey consumed on this occasion. He indicated a willingness to face prosecution for furnishing liquor to a minor, in view of the fact that Reynolds was under legal drinking age (J.A. 59-60; Ex., at 13-15). Bradshaw denied ever riding in Reynolds' truck, and he admitted that his right to drive in Oregon had been revoked (J.A. 62-65; Ex.,

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[2]*Miranda v. Arizona*, 384 U.S. 436 (1966). When asked, on cross-examination, why he had advised Bradshaw of his rights if he was not in custody, Hays replied:

> "I wanted to be sure to cover every possible angle and that at some point he may have said something that may have incriminated him, you know. Being somewhat familiar with the law, but not an expert, I wanted to be sure that I covered every angle. It's our policy that whenever we do interview an individual on a serious or possible serious nature [*sic*] like this, that his rights are made available." (J.A. 26; Tr. 32).

at 16-19). He declared himself ready to help the police in their investigation into Reynolds' death and suggested that Reynolds may have met with "foul play" at the hands of the person who allegedly had struck Bradshaw (J.A. 66-69; Ex., at 21-23).

At this point, Hays placed Bradshaw under arrest for furnishing liquor to a minor. Hays told Bradshaw that he was no longer free to leave and readvised him of his *Miranda* rights (J.A. 70-71; Ex., at 24-25). He informed Bradshaw that the police had interviewed several of the persons whom Bradshaw had named as witnesses to the alleged assault, and that those persons had witnesses to the fact that they had not been in Reynolds' cabin at the time the assault supposedly occurred. He then suggested, as a "theory," that Bradshaw had been driving Reynolds' truck the night before, had run off the road because he was intoxicated, had panicked and returned home, and was fabricating the story of the assault upon himself in order to account for the injuries he had received in the accident (J.A. 71-72; Ex., at 25). Bradshaw rejected Hays' suggestion. He insisted that he had witnesses to corroborate his story. He stated, "And I do want an attorney before it goes very much further" (J.A. 72; Ex., at 25-26).

Hays immediately terminated the conversation and handcuffed Bradshaw (J.A. 14, 16; Tr. 20, 22).

Shortly thereafter, and apparently while still at the police station, Bradshaw asked Hays, "Well, what is going to happen to me now?" (J.A. 16; Tr. 22).

According to Hays' uncontroverted testimony, the following occurred:

> ". . . I says [*sic*], 'You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say — because — since you have requested an attorney, you know, it has to be at your own free will.' I says [*sic*], 'I can't prevent you from talking, but you understand where your place — you know, where your standing is here?' and he agreed. He says [*sic*], 'I understand,' and — you know, and we had conversation from then on . . . ."

In the course of the ensuing conversation, and apparently while driving to the county jail, Hays suggested that Bradshaw submit to a polygraph examination to "clear this matter up and find out actually what happened." Bradshaw again expressed a desire to cooperate with the police, and he agreed to submit to this examination (J.A. 17-18; Tr. 23-24).

Late the next morning, at the county courthouse, Bradshaw submitted to a polygraph examination administered by State Police Trooper William Rainey. Prior to the examination, Rainey advised Bradshaw of his *Miranda* rights. Bradshaw executed a written consent to the examination (J.A. 30-33; Tr. 42-45). After the examination, Rainey told Bradshaw that in his opinion, Bradshaw had not been truthful in his answers to questions about

having driven Reynolds' truck. Bradshaw thereupon admitted to Rainey that, on September 13, he had passed out behind the wheel of the Reynolds' truck while driving Reynolds to a party, after the two of them had consumed a considerable amount of alcohol at Reynolds' cabin. (J.A. 33-35; Tr. 45-47).

At the conclusion of the pretrial hearing on the admissibility of evidence of Bradshaw's statements to Trooper Rainey, the trial court ruled as follows:

> "I find that the statements made to Officer — or, to Corporal Rainey were admissible. The evidence establishes that there were no threats, promises, or inducements, that the defendant was properly advised of his rights and that he did understand them and I also find that the evidence supports a conclusion that although Mr. Bradshaw had indicated his intent to have an attorney before it goes very much further, that within a short time after he made that statement he was initiating conversations in spite of the officer's replying to him, 'I can't talk with you,' and that I think that when I look at the total context of this, that there was, in fact, a change of this man's mind, that it was not brought on by any persuasion or argumentative kind of statements that were improper in any way and that the statements finally made to Officer Rainey — or, to Corporal Rainey were voluntary and followed a waiver and a knowing waiver of his right to remain silent . . . ." (J.A. 42-43; Tr. 81-82).

During Bradshaw's nonjury trial, his admissions to Rainey were introduced into evidence by a stipulation that Rainey's testimony at trial would be the same as it was in the pretrial hearing (Tr. 147-149). Bradshaw was found guilty of first degree man-

slaughter, driving under the influence of intoxicants, and driving while his license was revoked.

On Bradshaw's appeal, the Oregon Court of Appeals held that, notwithstanding the trial court's findings of fact, Bradshaw's statements to Trooper Rainey were erroneously admitted into evidence. The Oregon court based its conclusion upon this Court's decision in *Edwards v. Arizona*, 451 U.S. 477 (1981). The court of appeals reasoned that Bradshaw had not knowingly and intelligently waived the right to counsel that he had previously asserted during his conversations with Corporal Hays:

> " . . . We do not construe defendant's question about what was going to happen to him to have been a waiver of his right to counsel, invoked only minutes before, or anything other than a normal reaction to being taken from the police station and placed in a police car, obviously for transport to some destination. Though a conversation ensued, [Hays] clearly took advantage of the opening to reinterrogate defendant about his culpability and suggest the lie detector test, which was administered the next day.
>
> "The administration of the lie detector test and the subsequent interrogation of defendant were not at his suggestion or request, but were at the instance of authorities. . . ." *State v. Bradshaw*, 54 Or. App. 949, 953, 636 P.2d 1011, 1013 (1982) [Petition for Certiorari, at 13].

SUMMARY OF ARGUMENT

I

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the

majority of the Court indicated that once an arrestee has invoked his *Miranda* right to the assistance of counsel during custodial interrogation, it is a prerequisite for a subsequent waiver of that right that the arrestee "initiate" the further conversation which leads to the waiver. The majority opinion in *Edwards* has been interpreted, both by commentators and by lower courts, as declaring a strict "*per se* rule" which absolutely prohibits reviewing courts from finding a valid waiver of a previously asserted right to counsel, unless the accused reopens the dialogue with the authorities.

Interpreted this way, *Edwards* reaches an anomalous result. *Miranda* was concerned with protection of the accused's Fifth Amendment privilege against self-incrimination in the context of custodial interrogation. It recognized an accused's right to remain silent and right to the presence of counsel. Yet the majority opinion in *Edwards* unaccountably establishes different tests for these two aspects of the Fifth Amendment privilege. The majority opinion suggests that waiver of a previously invoked right to counsel is governed by a test different from the standard enunciated in *Michigan v. Mosley*, 423 U.S. 96 (1975), for waiver of a previous assertion of the right to remain silent. In *Mosley*, the Court held only that an arrestee's invocation of his rights under *Miranda* must be

scrupulously honored, but a waiver of previously asserted rights could nevertheless be shown to have been made intelligently and voluntarily, under the totality of the circumstances in which the alleged waiver occurred.

As a rationale for employing additional safeguards when an accused has invoked the right to counsel, rather than the right to remain silent, the *Edwards* majority suggested that the Court has traditionally regarded the right to counsel as requiring even greater protection than the right to remain silent. Whatever the relative value of the two rights may be, the standard for determining whether one facet of the accused's rights under *Miranda* has been waived should not be different from the standard for determining whether there has been a valid waiver of the other.

Miranda itself suggests no such distinction. To the contrary, the right it gave arrestees to the assistance of counsel was intended to further the basic right to remain silent during custodial interrogation. Logically, waiver of the derivative right to counsel should not be tested by more stringent standards than those used to judge waiver of the basic right to remain silent. Moreover, none of the Court's pre-*Edwards* decisions requires the distinction which the *Edwards* majority suggests.

Prior to *Edwards*, most lower courts drew no distinction between the standards to be applied in assessing waivers of the two *Miranda* rights. This fact at least indicates that the lower courts saw little authority in this Court's holdings for drawing such a distinction. It even suggests that they saw little practical necessity for requiring such a distinction.

The *Edwards* doctrine should not be extended to invalidate admissions made contemporaneously with readvisal of *Miranda* rights and substantially subsequent to initial conversations with police. Admittedly, whether the accused "initiated" the conversation with the authorities which followed his invocation of the right to counsel is a very significant factor to be considered in determining whether he waived that right. Still, it should not be regarded as absolutely dispositive. The accused may have invoked the right to counsel for any number of reasons. The authorities may have any number of legitimate reasons for reopening conversation with the accused. What constitutes "initiation" of any subsequent conversation may itself be open to dispute, as the present case demonstrates. And the tone and content of any subsequent conversation between the accused and the authorities obviously affects the validity of the accused's waiver of his

previously invoked right to counsel, regardless of who initiated the conversation.

For all of these reasons, the test for finding a valid waiver of a previously asserted *Miranda* right to counsel should be the same as the one enunciated in *Michigan v. Mosley* for finding a valid waiver of a previously asserted *Miranda* right to remain silent: was the accused's invocation of the right scrupulously honored, and was there a knowing and voluntary waiver of that right under the totality of the circumstances?

II

Even if *Edwards v. Arizona* establishes a "*per se* rule" concerning waiver of a previously invoked right to counsel, the Oregon Court of Appeals misapplied that rule in this case. Bradshaw "initiated" the further conversation in this case, by inquiring "[W]hat is going to happen to me now?" This inquiry is sufficient "initiation" of further conversation to invoke the "totality-of-circumstances" test which must be applied, under any reasonable interpretation of *Edwards*, when the accused himself initiates further conversation. *See* 451 U.S. at 486 n. 9. When, as in this case, the arresting officer delays the resumption of substantive conversation with the arrestee until he has obtained a further acknowledgment that the arrestee understands that he is waiving his previously asserted right, more is not

required to make the fruits of their subsequent conversation admissible. In holding to the contrary, the decision of the Oregon Court of Appeals is manifestly at variance with this Court's post-*Edwards* disposition of *Wyrick v. Fields*, ___ U.S. ___ , 51 U.S.L.W. 3411 (No. 82-158, Nov. 29, 1982), and with all decisions of other jurisdictions which discuss the concept of "initiation" suggested in *Edwards*.

ARGUMENT

In this state criminal prosecution, the Oregon Court of Appeals erroneously construed the Fifth Amendment, applicable by virtue of the Fourteenth Amendment. The court misread and misapplied *Edwards v. Arizona*, 451 U.S. 477 (1981), when it ruled that evidence of Bradshaw's incriminating statements to the state's polygraph operator should not have been admitted at his trial. The court held that, when Bradshaw expressed to Corporal Hays a desire to have "an attorney before it goes very much further," the police were forbidden to question him any further without providing counsel unless defendant himself initiated the incriminating conversation. The court concluded that subsequent conversations, including the polygraph examination on the following morning, were conducted at the instance of the police and in direct violation of defendant's rights. The fact that Bradshaw had asked Hays,

"Well, what is going to happen to me now?" after initially requesting the presence of counsel, was deemed insignificant by the court of appeals. Hence, the court held that Bradshaw did not make a valid waiver of rights prior to his incriminating statements.

The court of appeals evidently perceived the standard announced in *Edwards* as a *per se* rule forbidding any further police questioning after an accused's invocation of the right to counsel. If that perception is correct, this case demonstrates the error of that rule. This Court should take this opportunity to reexamine *Edwards* in light of the basic premises of *Miranda v. Arizona*, 384 U.S. 436 (1966), traditional concepts of waiver of constitutional rights, and the inherent faults in a *per se* rule.[3] The proper focus of the inquiry here should be on determining whether there was a voluntary, intelligent, and knowing waiver of the right to counsel, based upon an evaluation of the totality of the circumstances. Such a test safeguards the rights of the accused in a more realistic fashion without eliminating the possibility of waiver. This test,

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[3]Because *Edwards* provides an exception for defendant-initiated conversations after invocation of a right to counsel, it is, technically speaking, a qualified *per se* rule. However, if one assumes, as the court of appeals did, that there is no initiation by the defendant, then the absolute nature of the restriction on future police-initiated questioning certainly becomes a *per se* rule. Accordingly, when the term "*per se* rule" is used in this brief, it refers to a situation without post-invocation initiation by the defendant.

rather than a single-factor test suggested by *Edwards*, better achieves the goals of *Miranda* by restoring credibility to the process of police questioning in the context of the Fifth Amendment.

Even if this Court does not modify the *Edwards* rule, it should conclude nevertheless that the court of appeals erred in applying the rule to this case. It is evident that defendant, not the police, reopened the dialogue and thereby unilaterally abandoned his request for counsel. *Edwards* requires a multi-factor analysis from that point forward. The totality of the circumstances demonstrates that Bradshaw voluntarily, intelligently, and knowingly waived his rights, up to and including the point where he made an incriminating admission to the polygraph operator.

I

The determination of whether an accused has waived his Fifth Amendment right to counsel should be based upon the totality of the circumstances, rather than the single-factor test of *Edwards v. Arizona*.

Any discussion of this case logically begins with *Escobedo v. Illinois*, 378 U.S. 478 (1964), the predecessor to *Miranda v. Arizona*, *supra*. Police in *Escobedo* interrogated the accused prior to charging him formally. They failed to inform him of his right to silence, denied his request to consult with an

attorney, and informed him that they had convincing evidence of guilt. This Court concluded that evidence of the suspect's ensuing confession was inadmissible, because the authorities denied his request for counsel. The Court concluded:

> ". . . We hold only that when the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." 378 U.S. at 492.

Escobedo, however, left unanswered many questions regarding police questioning of suspects, *e.g.*, how is the Fifth Amendment right to be protected and implemented, and what standards should govern waiver of the right? In an effort to provide clear guidelines, the five-member majority in *Miranda v. Arizona*, *supra*, prohibited the government from using statements arising out of custodial interrogation absent "procedural safeguards" which effectively protected the Fifth Amendment right against self-incrimination. The Court set forth the now-famous *Miranda* "warnings," and required that they be given unless the state devised other effective means to inform accused persons of their right to silence and to assure a continuing opportunity to exercise it. The right to counsel, previously recognized only as a Sixth Amendment concept, was held to be a necessary adjunct to the Fifth Amendment.

Without being given the opportunity to have counsel present, a custodial suspect could make no intelligent right-to-silence decision. 384 U.S. at 469-473.

Concerning the right to silence, the Court stated:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. * * *." (Footnote omitted.) 384 U.S. at 473-474.

In the same paragraph the Court similarly addressed the Fifth Amendment's companion right to counsel:

> "* * * If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." 384 U.S. at 474.

The Court nevertheless made it clear that a defendant may waive both his right to silence and the attendant right to counsel, provided that the waiver is made voluntarily, knowingly, and intelligently. 384 U.S. at 475.

In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Court reexamined *Miranda*'s prohibitive language

regarding later questioning of a suspect who had invoked his right to remain silent. The police in *Mosley* arrested defendant in connection with some local robberies. After advice of *Miranda* rights, defendant declined to answer any questions, and the detective promptly ceased interrogation. Defendant at no time indicated a desire for counsel. Several hours later, another detective readvised defendant of his *Miranda* rights and questioned him about an arguably related homicide. Without seeking counsel or reinvoking his right to silence, defendant admitted his involvement in the killing.

Mosley claimed on appeal that the strict language of *Miranda* prevented any further questioning after his initial decision to remain silent. The Court reiterated *Miranda*'s attempt to establish a "set of safeguards" to protect an arrestee's Fifth Amendment rights, but it observed the inherent ambiguity of *Miranda*'s prohibition of interrogation after invocation of the right to silence. 423 U.S. at 99-102. Although *Miranda* stated that "the interrogation must cease," the Court in *Mosley* noted that *Miranda* said nothing about what circumstances, if any, would permit a resumption of questioning. Theoretically, the prohibition could be read literally to forbid any subsequent interrogation at any time or place on any subject, or to allow a resumption of interrogation after a momentary respite. Either of

these extreme literal interpretations would lead to "absurd and unintended results," the Court observed. 423 U.S. at 102. While interrogation after brief cessation would frustrate *Miranda*,

> "* * * [a]t the other extreme, a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Id.*

The Court concluded that

> "* * * neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." 423 U.S. at 102-103.

In following a "reasonable and faithful" interpretation of *Miranda*, the *Mosley* majority found the "critical safeguard" to be the person's "right to cut off questioning." 423 U.S. at 103. It is that right which *Miranda* requires to be "scrupulously honored." *Id.* The Court then reviewed the entire array of circumstances leading to Mosley's confession and concluded that the police had "scrupulously honored" his right to cut off questioning.

The *Mosley* majority expressly dealt only with the invocation of the right to silence and, other than quoting *Miranda*, made no attempt to examine a

similar situation involving the derivative right to counsel. 423 U.S. at 101 n. 7. However, this Court's rejection of a *per se* rule in *Mosley* prompted a number of lower courts to reject a *per se* prohibition of requestioning after assertion of the Fifth Amendment right to counsel. *See, e.g., White v. Finkbeiner*, 611 F.2d 186 (7th Cir. 1979), *vacated and remanded* 451 U.S. 1013 (1981), *on remand* 687 F.2d 885 (7th Cir. 1982); *United States v. Wilson*, 571 F.2d 455 (9th Cir. 1978); *United States v. Grant*, 549 F.2d 942 (4th Cir.), *cert. denied* 432 U.S. 908 (1977).[4]

The reasoning of the court in *White v. Finkbeiner*, *supra*, 611 F.2d at 192, is typical of that followed by other courts prior to *Edwards v. Arizona* on the question of "initiation":

> "* * * [T]here is no reason to conclude that as a prerequisite to a waiver, the suspect must have always initiated contact with the police [footnote omitted]. There may be instances where for some valid reason the police must contact the accused, and a confession follows this contact. * * * Of course, in those cases where the suspect does initiate the waiver, it will be much easier for the state to discharge its heavy burden of proving waiver. But this does not mean that where the police contact the suspect after a request for counsel the prosecution is prohibited from ever demonstrating a waiver."

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[4]*See also United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.), *cert. denied* 436 U.S. 919 (1978); *Cobbs v. Robinson*, 528 F.2d 1331 (2d Cir. 1975), *cert. denied* 424 U.S. 947 (1976); *but see Nash v. Estelle*, 597 F.2d 513 (5th Cir.), *cert. denied* 444 U.S. 981 (1979).

In short, before *Edwards*, courts generally applied a "totality of the circumstances" test to confessions obtained after an invocation of the right of counsel. Courts now agree, however, that *Edwards v. Arizona*, *supra*, drastically changed that approach.

In *Edwards* the Court unanimously agreed, albeit in three separate opinions, that defendant's statement was obtained in violation of his *Miranda* rights and thus was not admissible. The facts of the case involved extremely suspect police procedures. Arrested on murder, burglary, and robbery charges, Edwards was advised of his *Miranda* rights and, after some initial questioning, requested counsel. The police then ceased the interrogation. When two detectives asked to see defendant the next morning, he told a guard that he did not wish to speak to anyone. The guard replied that defendant "had to" talk to the detectives. The police then readvised defendant of his *Miranda* rights, and he ultimately gave an incriminating statement.

The crux of the majority opinion in *Edwards* is as follows:

> "* * * [A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation [citation omitted], the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid

> waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights [footnote omitted]. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-485.

Cases decided by lower courts since *Edwards* have interpreted this language as establishing a *per se* rule prohibiting any requestioning of a defendant after invocation of the right to counsel unless he initiates the communication. *See, e.g., United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), *aff'd.* 672 F.2d 115 (D.C. Cir. 1982); *Vaughn v. State*, 248 Ga. 127, 281 S.E.2d 594 (1981); *State v. McCloskey*, 90 N.J. 18, 446 A.2d 1201 (1982).[5] According to these cases, *Edwards* prohibits a "totality of the circumstances" analysis unless the facts show that the accused, not the police, renewed any colloquy with the authorities. Here, of course, the Oregon Court of Appeals similarly applied *Edwards* in suppressing defendant Bradshaw's confession. For a variety of reasons, any such *per se* rule in *Edwards*

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[5] *See also State v. Dominguez*, 97 N.M. 592, 642 P.2d 195 (N.M. App. 1982); *Hunt v. State*, 632 S.W.2d 640 (Tex. Crim. App. 1982); *United States ex rel. Kimes v. Greer*, 541 F. Supp. 632 (N.D. Ill. 1982).

should at this time be expressly abrogated by this Court.

Miranda itself does not require the imposition of a *per se* rule which elevates "initiation" to the status of a single controlling factor. Admittedly, *Miranda* used different language to describe the procedure to be followed when different rights were involved. If the accused wishes to remain silent, "the interrogation must cease," whereas, if he requests counsel, "the interrogation must cease until an attorney is present." 384 U.S. at 473-474. Nowhere, however, does *Miranda* suggest that different standards should obtain in determining whether a person has waived either right after its assertion. If anything, the contrary is suggested by *Miranda*'s discussion of the two rights in the same sentence dealing with waiver:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U.S. at 475.

It is significant that the right to counsel in *Miranda* is a *derivative* one. Because of the peculiar circumstances of custodial interrogation, the *Miranda* Court held that the Fifth Amendment right to silence can best be safeguarded when accompanied by the right to the presence of counsel.

Although the two rights are spoken of separately, they both flow from the same source. If there is a qualitative difference between the two, logic dictates that the right to silence is paramount since the *Miranda* right to counsel serves only as an adjunct, albeit an important one, to the protection of the Fifth Amendment privilege.[6] *Miranda* provides no basis for concluding that the converse is true and that waiver of the right to counsel is subject to a stricter standard than waiver of the right to silence. However valuable the right to counsel may be in a custodial setting, it remains auxiliary to the right to silence under the *Miranda* analysis.

Also, as this Court recognized in *Michigan v. Tucker*, 417 U.S. 433, 444 (1974), *Miranda*'s "safeguards [are] not themselves rights protected by the Constitution." The *Miranda* "right" to counsel is a prophylaxis that enables suspects to exercise their privilege against self-incrimination in an intelligent manner. *Edwards* raises the derivative right to counsel higher than the value it seeks to protect. It not only gives the right to counsel greater worth than the right of silence: it also imbues it with a constitutional basis. *Edwards* is, therefore, in direct conflict with *Miranda* in this regard.[7]

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[6]Both the defendant and the court of appeals relied only on the Fifth Amendment and *Miranda* as the grounds for excluding the statement in this case. Thus, any question of a purported Sixth Amendment right to counsel is not before this Court.

[7]*See The Supreme Court, 1980 Term*, 95 Harv. L. Rev. 93, 131 n. 59 (1981).

In *Michigan v. Mosley*, *supra*, the majority opinion suggested that *Miranda* "distinguished between the procedural safeguards" triggered by the exercise of the right to silence and the exercise of the right of counsel. 423 U.S. at 104 n. 10. The distinction, however, was made in response to the dissenting opinion's suggestion that questioning a person who has indicated a desire to remain silent may not be resumed until counsel is present. The *Mosley* majority responded by noting that *Miranda* forbids reinterrogation until counsel is present only when the accused has requested counsel, not when he has merely refused to answer further questions. *Id.* The majority carefully observed that a question of waiver of counsel was not before it. Thus, it neither suggested nor implied that a post-invocation waiver of counsel should be judged by any test other than the totality test applied to a post-invocation waiver of the right of silence.

Justice White's concurring opinion in *Mosley* proposed, contrary to the above-summarized reading of *Miranda*, that *Miranda* indeed "create[d] a per se rule against further interrogation after assertion of [the right to counsel]." 423 U.S. at 109-110. He further suggested a rationale for such a *per se* rule when the right to counsel is asserted and the right to remain silent is not invoked:

> "* * * [T]he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. * * * More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." 423 U.S. at 110 n. 2.

Edwards cites this quotation with approval and apparently incorporates the rationale into the later decision. 451 U.S. at 485.[8] However, the distinction is flawed. It should be abandoned.

The dichotomy of the two rights assumes far too much. It assumes that all defendants are the same, that all custodial interrogations are alike, and that the goals of *Miranda* can only be achieved through uniformity, regardless of factual variety. Every defendant is different and each custodial interview possesses its own character. Although one may assume that some defendants assert their right to silence because they understand their right and consider themselves capable of deciding their own fate, the same cannot be said for all. The reasons for talking or remaining mute are as varied as the

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[8]Some post-*Edwards* cases also have incorporated this rationale. *See, e.g., Vaughn v. State, supra*; *State v. McCloskey, supra*; *State v. Collins*, 30 Wash. App. 1, 632 P.2d 68 (1981). On the other hand, there is a tendency to confuse the two rights both in their bases and in the standard for waiver. *See People v. Smith*, 120 Cal. App. 3d 746, 174 Cal. Rptr. 916 (1981).

arrestees themselves and their particular circumstances.

Similarly, it is reasonable to assume that some defendants who invoke *Miranda*'s right to counsel do so through a conscious recognition of an inability to act in their own best interests. It is just as reasonable to assume, however, that other defendants do so for many other reasons.[9] Some may be "street-wise" and invoke counsel merely as a ploy to manipulate the police. Others may simply use it as another way of saying that they want to remain silent. Still others may just be reacting spontaneously without even momentary reflection on their competence to proceed. It stands to reason that, for example, an arrested ex-police officer ordinarily functions at a different level of sophistication and awareness than does a juvenile first offender; but a single-factor approach fails to recognize this distinction.

Also, a defendant's reaction depends largely on the specifics of the questioning. References to culpability, accomplices, custodial status, and possible negotiations may precipitate different responses for wholly different reasons. Stated simply, an absolute distinction between invocation of the right of silence and invocation of the right of counsel which fails to consider individual circum-

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[9] *Fifth Amendment — Waiver of Previously Invoked Right to Counsel*, 72 Jour. of Crim. Law & Criminology, 1288, 1303 n. 87 (1981).

stances is arbitrary and unrealistic. The distinction does injustice to the careful balance of interests between defendant and the state which *Miranda* seeks to protect.

Edwards' per se proscription of renewed questioning after a request for counsel presents significant practical and theoretical problems. Generally, any *per se* rule derives both its strength and its weakness from its inflexibility. The rule suggested by *Edwards* is no exception. Here, however, its negative features far outweigh any theoretical benefit.

In wholesale fashion, *Edwards* combines all defendants and all interrogations into one general category, irrespective of the obvious distinguishing characteristics articulated above. This approach is directly contrary to that of *Michigan v. Mosley*, *supra*, *North Carolina v. Butler*, 441 U.S. 369 (1979), and *Fare v. Michael C.*, 442 U.S. 707 (1979), all *Miranda* cases which eschewed rigid *per se* rules in favor of totality of the circumstances analysis. *Mosley*, *Butler*, and *Fare* are alike in their recognition that *Miranda*'s worthy goals can only be achieved on a case-by-case basis. *Edwards* departs from this realistic approach and assumes that each instance of custodial interrogation follows a uniform textbook example. Experience demonstrates that this assumption is unwarranted.[10]

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[10] *See*, for example, the cases cited and discussed below at pp. 37-41. *See generally* Inbau and Reid, *Criminal Interrogation and Confessions* (2d ed. 1967).

As the court of appeals noted in the pre-*Edwards* case of *United States v. Rodriguez-Gastelum*, 569 F.2d 482, 487 (9th Cir.), *cert. denied* 436 U.S. 919 (1978), *per se* rules often cause one to lose touch with the reasons for their creation. The announced purpose of *Miranda v. Arizona* was to protect the privilege against self-incrimination and to insure that any waiver thereof was made "voluntarily, knowingly and intelligently." 384 U.S. at 444. While attempting to do just that, the *Edwards* decision, because of its broad ambit, seriously risks just the opposite. In the case at bar, the circumstances indicate a voluntary, knowing, and intelligent waiver of the right to counsel by defendant Bradshaw. Indeed, Bradshaw was reminded of his constitutional rights immediately after he asked, following his request for counsel, "[W]hat is going to happen to me now?" He was advised again of his *Miranda* rights the next morning before he submitted to a polygraph examination. However, at least as the Oregon Court of Appeals saw it, application of the *Edwards per se* rule rendered his statements to the polygraph examiner inadmissible. *Miranda* loses both credibility and effectiveness when interpreted so rigidly.

The *Edwards per se* rule allows for only one exception: initiation of the communication by the defendant. Although this permits some flexibility in application to individual defendants, it nevertheless creates unnecessary problems which detract from the achievement of *Miranda*'s relatively simple goals. What began as an inquiry into the voluntariness of an accused's statements to the police and evolved into an inquiry into the voluntariness of the waiver preceding the statements is carried one step further. Now, there must be a preliminary analysis as to who began the interchange, the questioner or the person questioned. This case demonstrates that such analysis is both difficult and not necessarily conducive to a proper application of *Miranda*. Does "initiation" relate to the precise moment of incrimination, or does it refer generally to an entire exchange or series of conversations, regardless of substantive content? How is the determination of "initiation" to be made in cases where innocuous conversation is mixed with remarks which are pertinent to the criminal investigation.[11] Is there a

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[11]In many cases the initiation inquiry is coupled with an equally difficult question of whether there was any interrogation under the test enunciated in *Rhode Island v. Innis*, 446 U.S. 291 (1980). *See, e.g., United States v. Thierman*, 678 F.2d 1331 (9th Cir. 1982); *Trest v. State*, 409 So. 2d 906 (Ala. Crim. App. 1981); *State v. Emery*, 131 Ariz. 493, 642 P.2d 838 (1982); *State v. Innis*, ___ R.I. ___, 433 A.2d 646 (1981) (on remand), *cert. denied* ___ U.S. ___ (1982). In such cases, a trial judge must determine not only who initiated the exchange but whether it even constituted interrogation under *Innis*. Ironically, the latter determination is made under a variation of the totality of the circumstances test. *See*, 446 U.S. at 302 n. 8.

relevance test? Does the officer's intent become a factor? Can the officer lend any encouragement? Is there a minimum amount of initiation required on the part of the defendant? If so, how much? The Oregon Court of Appeals, understandably, had difficulty answering these questions and, in attempting to answer them, reached an unreasonable result in this case.

In addition to posing problems of definition and application, the term "initiation" is an inadequate standard for dealing with the multitude of factors involved in custodial defendant-police relations. There may be instances when, for some valid reason, the police *must* reinitiate verbal contact. *See White v. Finkbeiner, supra*, 611 F.2d at 192; *United States v. Wilson*, 571 F.2d 455 (9th Cir. 1978); *Commonwealth v. Harris*, ___ Pa. Super. ___ , 443 A.2d 851 (1982). For example, if new charges arise, the authorities should not be required to keep a defendant in ignorance of them. Also, the discovery of new evidence or a change in circumstances as innocuous as a transfer to a different facility may significantly alter a defendant's situation. As it stands, *Edwards* not only encourages but, under a strict reading, requires the authorities to stand mute or risk obtaining an inadmissible statement.

By chilling any post-invocation verbal contact with an accused person, *Edwards* clearly works to

the detriment of a person in custody. Its direct effect is to encourage authorities to hold defendants *incommunicado*, something which *Miranda* might view as a coercive circumstance in itself. But an even more apparent danger lies in the implicit creation of an irrevocable invocation of the right to counsel. As discussed above, defendants invoke rights for any number of reasons. If an officer is forbidden to communicate further unless the accused initiates the exchange, the officer cannot inform the defendant of any substantive information about his case or his general status without "reinitiating" conversation. That being the case, *Edwards* "imprison[s] [defendant] in his privileges." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942). The intelligent examination of options which began in *Miranda* suddenly becomes an exercise in ignorance because, unless he possesses clairvoyance or is forthright enough to ask, the defendant will know nothing of the change in circumstances. The subject of the new information, whatever it might be, could be the very thing which caused the defendant to be nonconversant in the first place, but the officer is prohibited from volunteering it.

The proper approach is the "totality of the circumstances" analysis advanced by *Mosley* and other post-*Miranda* decisions. In practice, this analysis fosters *Miranda*'s admirable goal of intelli-

gent exercise of Fifth Amendment rights, while furthering *Miranda*'s other concern, the intelligent choice of waiver. By focusing on the whole array of factual circumstances, rather than a single element, the totality test more accurately addresses the situation faced by a defendant. Because any custodial statement is usually the product of more than one circumstance, the test of the statement's admissibility logically should be multi-faceted.

Since this Court's decision in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), the general test for waiver of a constitutional right has been whether there exists "an intentional relinquishment or abandonment of a known right or privilege."[12] This analysis, the Court said, depends on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* Because the Court has deemed such a standard sufficient to protect the constitutional right to silence itself, the test logically should be more than adequate in fostering *Miranda*'s derivative right to counsel.

In examining the totality of the circumstances in a case of post-invocation waiver, the origin of the renewed conversation is a highly relevant factor. In

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[12]As Justice Powell observed in his concurring opinion in *Edwards*:

> "* * * There is no indication, in the multitude of cases that come to us each Term, that *Zerbst* and its progeny have failed to protect constitutional rights." 451 U.S. at 492 n. 2.

some cases of heavy-handed police misconduct, it may very well be the determining factor, and thus would require suppression of a subsequent confession. But in most cases, "initiation" is only one of several elements in the analysis. Whatever the particular situation, a single element of fact, to the exclusion of all others, should not control the outcome.

In the present case, defendant never contended in the Oregon courts that his confession was inadmissible under a totality of the circumstances test. His only claim was that the *per se* rule of *Edwards* rendered any waiver of his *Miranda* rights invalid because the police, not he, initiated the post-invocation conversation. Any such *per se* rule should be abandoned. The trial court's express determination of waiver based on the totality of the circumstances should be revived.

II

Even if *Edwards v. Arizona* established a *per se* rule, the Oregon Court of Appeals misapplied it in this case.

If this Court concludes that the so-called *per se* rule of *Edwards* is a correct statement of the law regarding custodial interrogation after an invocation of the *Miranda* right to counsel, the question remains whether the Oregon Court of Appeals correctly applied it to the facts at bar. The court of

appeals attributed no significance to the fact that shortly after he claimed his right to counsel, Bradshaw asked Corporal Hays, "Well, what is going to happen to me now?" The court held that defendant did not "initiate" the renewed conversation with the authorities and, thus, that the *Edwards* exception to the *per se* rule did not apply. Under a plain reading of *Edwards*, the determination of the court of appeals is wrong.

Edwards expressly addressed the situation in the present case. According to the majority opinion, police are precluded from questioning a suspect who asks for counsel

> "* * * unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 485.

After discussing this single factor in the context of defendant Edwards' confession, the Court hypothesized that a different result would have obtained had Edwards "initiated" his second meeting with the police and, in effect, "volunteered" his statements. *Id.* In discussing this event with regard to the question of "interrogation" under the analysis of *Rhode Island v. Innis, supra*, the Court added a footnote that is very pertinent here:

> "If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be 'interrogation.' In that event, the question would be whether a valid waiver of the

> right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." 451 U.S. at 486 n. 9.

In other words, a defendant's assertion of the right to counsel is not irrevocable. If he elects, on his own volition, to reopen the dialogue with the police, the so-called *per se* rule no longer applies. Instead, traditional concepts of intelligent, knowing and voluntary waiver come into play, and the test is the multi-factor "totality of the circumstances" standard employed in a *Michigan v. Mosley* analysis.

Obviously, there are cases in which a verbal interchange between the police and an arrestee is "mixed," *i.e.*, consists of conversation both pertinent and irrelevant to the matter under investigation. Contrary to the Oregon Court of Appeals' suggestion, however, *Edwards* clearly does not render inadmissible every nonspontaneous portion of a conversation resumed at the accused's behest. Rather, if a mixed dialogue is initiated by defendant, the waiver test is an evaluation of the totality of the circumstances. Once a defendant unilaterally indicates a willingness to talk with his accuser, his prior invocation of the right to counsel must be viewed in light of other factors. The accused obviously has reconsidered his prior decision at that

point. A trial court evaluating the waiver of the presence of counsel is therefore required to make the more customary examination of all the circumstances, not just the previous assertion of the right.

The fact that what follows the "initiation" may be an amalgam of both the innocuous and the incriminating does not change the analysis. *Edwards* recognized that custodial interrogation presents no exception to the simple realities underlying all human conversation. Once a conversation starts (*i.e.*, is "initiated"), questions and answers, remarks and reactions, requests and responses, flow at will. At that point it is difficult, if not impossible, to isolate interrogation from volunteered remarks with any degree of certainty. *Edwards* recognizes this reality by abandoning a rigid *per se* rule and substituting a flexible totality of the circumstances test once the defendant, on his own, opens the channels of communication. The court of appeals failed to apply the totality standard and thus erred.

Each case of "initiation" is obviously different from others on its facts, but it is helpful to examine similar decisions by this Court and by other courts. These decisions put the Oregon Court of Appeals holding in perspective and demonstrate how the Oregon court erroneously applied *Edwards* here.

A recent *per curiam* decision by this Court, *Wyrick v. Fields*, ___ U.S. ___ , 51 U.S.L.W. 3411

(No. 82-158, Nov. 29, 1982), although factually distinguishable, demonstrates that a defendant-initiated dialogue triggers a totality of the circumstances analysis. After consulting with counsel, Fields himself initiated a conversation with military police by asking if he could take a polygraph examination. The police advised Fields of his rights and he waived them. When the polygraph results indicated that the accused had been untruthful, the officer asked him why his answers were bothering him. In response, defendant admitted having had intercourse with the woman he was accused of raping. This Court reversed an Eighth Circuit holding that evidence of the statement was inadmissible. The Court reasoned that the Eighth Circuit had failed to examine the incriminating statement under the totality of the circumstances, as required by *Edwards v. Arizona*. Because Fields opened the dialogue by requesting the polygraph, the Court said that his post-examination conversation with the officer was subject to the standard set forth in footnote 9 of *Edwards* and not the *per se* rule erroneously employed by the circuit court of appeals. This Court did not limit its admissibility ruling to remarks made contemporaneously with Fields' initiation of dialogue with police.

In *Dillard v. State*, 275 Ark. 320, 629 S.W.2d 291 (1982), the police terminated their interview after

defendant requested counsel. Much like Bradshaw, the defendant nevertheless continued, "But I want to know what this is all about." 275 Ark. at 322, 629 S.W.2d at 292. The police then told him the facts of the crime, and defendant continued the conversation. Despite repeated police warnings about his right to counsel, defendant made incriminating statements. The court held that, under *Edwards*, defendant initiated the interrogation and evidence of his subsequent statements was admissible.

Similarly, the authorities honored defendant's request for counsel by ending the initial interview in *People v. Thomas*, 98 Ill. App. 3d 852, 54 Ill. Dec. 235, 424 N.E.2d 985 (1982), *cert. denied* ___ U.S. ___ (1982). Defendant then inquired about the details of accomplices' statements linking him to the crime. An officer reread defendant his rights, and incriminating statements followed. Citing *Edwards*, the court held:

> "This voluntary reinitiation of interrogation reflects a knowing and intelligent relinquishment of the Sixth Amendment right to counsel." 98 Ill. App. 3d at 856, 424 N.E.2d at 989.

In *Leuschner v. State*, 49 Md. App. 490, 433 A.2d 1195 (1981), *cert. denied* ___ U.S. ___ (1982), the police stopped questioning defendant upon his assertion of the right to counsel. "Without the slightest instigation by the police officers," defendant continued his conversation by talking first to

his girlfriend in the officers' presence and later joining them in the discussion. 49 Md. App. at 495, 433 A.2d at 1198. The court held that there was no interrogation until after defendant had, "by his conduct, words and actions," waived his prior invocation. 49 Md. App. at 497, 433 A.2d at 1199. The police did not initiate the conversation by merely answering his request for a telephone and then listening to the garrulous defendant "uninterruptedly rattle." 49 Md. App. at 498, 433 A.2d at 1199. The court held that there was no police initiation, even if the police officers' interjections were the functional equivalent of interrogation.

After terminating an interview in *State v. Pittman*, 210 Neb. 117, 313 N.W.2d 252 (1981), the officer was on his way out the door when defendant spontaneously remarked that he was being "railroaded" by his co-defendants. The officer responded that he only had one side of the story and would gladly hear defendant's version. Without ever again mentioning an attorney, defendant gave a statement in response to formal police interrogation. Applying *Edwards*, the court held that defendant initiated the conversation and validly waived his rights.

Defendant in *State v. Blakney*, ___ Mont. ___, 641 P.2d 1045 (1982), also started talking after he asserted his *Miranda* right to counsel and before the police had left the room. They warned him of his

rights, but he said that he did not want counsel after all. In upholding the resultant confession, the court employed footnote 9 of the *Edwards* opinion to examine the totality of the circumstances of defendant's reinitiation of the colloquy with the authorities.

A pre-*Edwards* case, *United States v. Webb*, 633 F.2d 1140 (5th Cir. 1981), is also instructive. Questioning ceased upon defendant's assertion of the right of counsel. Defendant then remarked, "I want you to tell me what I'm charged with." 633 F.2d at 1141. In the process of answering defendant's question, the F.B.I. agent mentioned a co-defendant's confession. The defendant then incriminated himself. The court held:

> "While we are concerned that a suspect's request for counsel should result in an immediate end to all forms of interrogation, we believe that the information provided by the FBI agent was responsive to [defendant's] question and not an attempt to prolong interrogation." *Id.*, 633 F.2d at 1142.

Other examples of defendant-initiated conversation abound.[13] The holdings in these numerous and factually various cases isolate the aberrant decision

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[13] *See, e.g., United States v. Gordon*, 655 F.2d 478 (2d Cir. 1981); *State v. Piatt*, 132 Ariz. 145, 644 P.2d 881 (1981); *Coble v. State*, 274 Ark. 134, 624 S.W.2d 421 (1981), *cert. denied* ___ U.S. ___ (1982); *Caffo v. State*, 247 Ga. 751, 279 S.E.2d 678 (1981); *State v. Ruth*, 102 Idaho 638, 637 P.2d 415 (1981); *People v. Wegman*, 101 Ill. App. 3d 634, 57 Ill. Dec. 87, 428 N.E.2d 637 (1981); *State v. Johnson*, 318 N.W.2d 417 (Iowa 1982); *Wantland v. State*, 49 Md. App 636, 435 A.2d 102 (1981) *cert. denied* ___ U.S. ___ (1982); *State v. Killay*, 430 A.2d 418 (R.I. 1981); *State v. Grisby*, 97 Wash. App. 2d 493, 647 P.2d 6 (1982).

by the Oregon Court of Appeals in the present case. The court misapplied *Edwards v. Arizona*'s standards on initiation, and its decision herein should be reversed.

In the case at bar, the trial court correctly determined that, based upon the totality of the circumstances, Bradshaw initiated further conversation and made an intelligent, knowing, and voluntary waiver of rights. After defendant's assertion of the right to counsel, Corporal Hays promptly terminated his interrogation. Defendant, on his own volition and with no prompting whatsoever, asked Hays, "[W]hat is going to happen to me now?" Hays did not immediately seize the opportunity to requestion defendant. Rather, he carefully reminded Bradshaw of his previous request for counsel, with the apparent intent of furthering, not violating, that right. Defendant responded by acknowledging that he understood his situation and that he was resuming the conversation of his own free will. In the course of the ensuing conversation, apparently while en route to the county jail, Hays broached the subject of a polygraph examination to "clear this matter up and find out actually what happened." Bradshaw reaffirmed his cooperation and agreed to take the test. When the occasion for the test arose late the next morning, the polygrapher, Trooper

Rainey, readvised defendant of his *Miranda* rights. Bradshaw waived his rights and proceeded with the polygraph examination. When Rainey advised Bradshaw that he thought Bradshaw had been untruthful during the examination, Bradshaw confessed.

Under the totality of these circumstances, it is evident that Bradshaw had intelligently, knowingly, and voluntarily abandoned and waived his previously asserted request for counsel before he made the critical admissions. *See Wyrick v. Fields, supra.* The Oregon Court of Appeals erred in holding to the contrary.

CONCLUSION

For the above reasons, the judgment of the Oregon Court of Appeals should be reversed and this case remanded for further proceedings.

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No. 81-1857

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OREGON, *Petitioner*,

v.

JAMES EDWARD BRADSHAW, *Respondent*.

On Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

"Does a police officer violate the limits of custodial interrogation established in *Edwards* v. *Arizona*, 451 U.S. 477 (1981) where he reinterrogates an arrestee concerning his culpability after the arrestee had previously invoked the right to counsel and asked the limited procedural question 'What is going to happen to me now?' "

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Oregon Court of Appeals reversing Bradshaw's conviction is reported at 54 Or. App. 949, 636 P.2d 1011 (1981). The order of the Oregon Supreme Court denying the State's petition for review is reported at 292 Or. 568, 644 P.2d 1129 (1982). these opinions are set forth in the Petition for Certiorari at 10-14.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

United States Constitution, Amendment XIV, § 1:

". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATUTORY PROVISIONS INVOLVED

Oregon Revised Statutes 471.410(2), (3)(a):

"(2) No person other than his parent or guardian shall sell, give or otherwise make available any alcoholic liquor to any person under the age of 21 years. A person violates this subsection if he sells, gives or otherwise makes available alcoholic liquor to a person with the knowledge that the person will violate this subsection.

"(3) Upon violation of subsection (2) of this section, the court shall impose a mandatory minimum sentence as follows:

"(a) Upon a first conviction for the offense, a fine of $200."

Oregon Revised Statutes 471.990(1):

"(1) Except where other punishment is specifically provided for, violation of any provision of this chapter is a misdemeanor."

Oregon Revised Statutes 161.565:

"An offense is a violation if it is so designated in the statute defining the offense or if the offense is punishable only by a fine, forfeiture, fine and forfeiture or other civil penalty. Conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime."

Oregon Revised Statutes 161.575:

"(1) Any violation defined in the Oregon Criminal Code is expressly designated in the section defining the offense. Any offense defined outside this code which is punishable as provided in ORS 161.565 shall be considered a violation.

"(2) Violations are not classified."

Oregon Revised Statutes 161.635(3):

"(3) A sentence to pay a fine for a violation shall be a sentence to pay an amount, fixed by the court, not exceeding $250."

Oregon Revised Statutes 133.310(1)(a)(b):

"(1) A peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed:

"(a) A felony, a Class A misdemeanor or an unclassified offense for which the maximum penalty allowed by law is equal to or greater than the maximum penalty allowed for a Class A misdemeanor, or a major traffic offense as defined in ORS 484.010(5)'

"(b) Any other offense in the officer's presence except traffic infractions as defined in ORS 153.305."

Oregon Revised Statutes 161.615(1):

"Sentences for misdemeanors shall be for a definite term. The court shall fix the term of imprisonment within the following maximum limitations:

"(1) For a Class A misdemeanor, 1 year."

Oregon Revised Statutes 484.010(5):

"(5) 'Major traffic offense' means a violation of any of the following provisions of law or a city ordinance conforming thereto:

"(a) Reckless driving as defined in ORS 487.550.

"(b) Driving while under the influence of intoxicants, as defined in ORS 487.540.

"(c) Failure to perform the duties of a driver involved in an accident or collision, as defined in ORS 483.602 (1) and (2) and 483.604.

"(d) Driving while suspended or revoked, as defined in ORS 487.560.

"(e) Fleeing or attempting to elude a police officer, as defined in ORS 487.555.

"(f) Driving after being declared to be a habitual offender, as set forth in ORS 484.740."

Oregon Revised Statutes 487.550(2):

"(2) Reckless driving is a Class A misdemeanor."

Oregon Revised Statutes 487.540(2):

"(2) Driving while under the influence of intoxicants is a Class A misdemeanor."

Oregon Revised Statutes 487.560(5), (6):

"(5) Except as provided in subsection (6) of this section, driving while suspended or revoked is a Class A misdemeanor.

"(6) Driving while suspended or revoked is a Class C felony if the suspension or revocation was the result of a finding that the person is an habitual traffic offender under ORS 484.730 or of a conviction for any of the following offenses:

"(a) Any degree of murder, manslaughter, criminally negligent homicide or assault resulting from the operation of a motor vehicle.

"(b) Any crime punishable as a felony with proof of a material element involving the operation of a motor vehicle.

"(c) Failure to perform the duties of a driver involved in an accident or collision which results in physical injury or death to any person.

"(d) Reckless driving.

"(e) Fleeing or attempting to elude a police officer.

"(f) Driving while under the influence of intoxicants."

Oregon Revised Statutes 487.555(4):

"(4) Fleeing or attempting to elude a police officer is a Class A misdemeanor."

Oregon Revised Statutes 484.740:

"Except as provided in ORS 484.735(2), it shall be unlawful for any person to operate a motor vehicle in this state while the order of the court prohibiting such operation remains in effect. A person who violates this section commits a Class C felony."

STATEMENT OF THE CASE

A. Statement of Facts:

On Sunday, September 14, 1980, Lloyd Reynolds' body was found in his wrecked pickup truck along the coastal highway near Rockport, Oregon (J.A. 6, 11; Tr. 13, 17).[1] Gerald Hays, a state police corporal, commenced an investigation. Denver Buxton, a Rockaway police officer, advised Hays that Bradshaw had previously reported being assaulted while drinking at the deceased's cabin on Saturday evening (J.A. 7; Tr. 13). Kimberly Asher, the deceased's girlfriend, told Hays she had not been present at the cabin on Saturday evening (J.A. 10; Tr. 16).

On Sunday evening, Officers Hays and Buxton proceeded to Reynolds' cabin and conducted a warrantless search of his

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[1] "J.A." refers to the joint appendix; "Tr." refers to the transcript of the trial court proceedings; and "Ex.2" refers to Pretrial Exhibit 2, the transcript of Bradshaw's tape-recorded statement to Corporal Hays on September 14, 1980; "Ex.11" refers to Trial Exhibit 11 containing police information reports.

personal effects (J.A. 6-7; Tr. 13). Bradshaw, who resided with his grandmother Irma Stockdale at the group of cottages, approached the officers (J.A. 7; Tr. 13). Hays told defendant why he was there and asked about defendant's knowledge of Reynolds (J.A. 8; Tr. 14). Bradshaw indicated he had purchased alcoholic beverages that he and Reynolds had consumed on Saturday (Tr. 117). He showed Hays two empty whiskey bottles (Tr. 117). Hays noticed "numerous six-packs of empty beer bottles" (Tr. 119). Bradshaw indicated others joined them and he had been assaulted in Reynolds' cabin on Saturday night by a man named "Bash" (J.A. 8-9; Tr. 14-15). Bradshaw claimed the deceased, Kimberly Asher, Cynthia Reynolds and an unidentified man had also been present (J.A. 8-9; Tr. 14-15).[2]

Shortly thereafter, David Bash arrived at the cabin (J.A. 10; Tr. 6). He told the officers he had not been present at Reynolds' cabin on Saturday night (J.A. 10; Tr. 6). Based on this inconsistency, Hays asked Bradshaw to accompany him to the Rockaway Police Department for a taped interview (J.A. 10; Tr. 16). Hays, who considered defendant a suspect, advised him he was not in custody and was free to leave (J.A. 10; Tr. 17). Bradshaw voluntarily accompanied Hays to the station (J.A. 10; Tr. 16).

At the police station, Hays advised Bradshaw of his *Miranda*[3] rights and the nature of the investigation he was conducting (J.A. 46; Ex.2, at 1-2). Bradshaw, a school dropout, acknowledged understanding these matters and that he was free to leave (J.A. 45-47, 55; Ex.2, at 1-3, 10). He indicated his plan to leave for St. Helens that evening and noted he had consumed four beers earlier in the day (J.A. 45, 47; Ex.2, at 1, 3).

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[2] In a previous contact with Officer Buxton, Bradshaw described his version of the assault in Reynolds' cabin, and asked if the officer would bring any charges against him for buying alcohol for Reynolds, a 20-year old minor (J.A. 60; Ex. 2, at 14).

[3] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Hays, accompanied by Officer Buxton, questioned Bradshaw about Saturday's events (J.A. 48, 56; Ex.2, at 3, 11). Bradshaw responded that he and Reynolds drank beer and whiskey in Reynolds' cabin (J.A. 48-49; Ex.2, at 4). Others had joined them, an argument ensued, and someone struck Bradshaw in the head knocking him unconscious (J.A. 48-53, 58; Ex.2, at 3-8, 12). Larry Moorehead, a friend of Mrs. Stockdale, called the police (J.A. 56; Ex.2, at 11). Officer Buxton responded, called an ambulance, and Bradshaw was taken to a hospital for treatment (J.A. 56; Ex.2, at 11). The treating physician indicated Bradshaw's skull was nearly cracked (J.A. 54; Ex.2, at 9).

Bradshaw admitted buying the beer and whiskey consumed by Reynolds. He indicated a willingness to face prosecution for furnishing liquor to a minor, in view of the fact that Reynolds was under the legal drinking age (J.A. 59-60; Ex.2, at 13-15). Halfway through the interview, Bradshaw asked if he would be charged. Hays stated, "This is possible . . . It's very possible." (J.A. 60; Ex.2, at 14-15).

Hays continued questioning Bradshaw (J.A. 60; Ex.2, at 15). Bradshaw denied ever riding in Reynolds' truck, and he admitted that his right to drive in Oregon had been revoked (J.A. 62-65; Ex.2, at 16-18). He declared himself ready to help the police in their investigation into Reynolds' death and suggested that Reynolds may have met with "foul play" at the hands of the person who allegedly had struck Bradshaw (J.A. 66-69; Ex.2, at 21-23).

At this point, Hays placed Bradshaw under arrest for furnishing liquor to a minor. Hays told him he was no longer free to leave and readvised him of his *Miranda* rights (J.A. 70-71; Ex.2, at 24-25).

The interview concluded after the following confrontation:

> "Q. [BY HAYS] * * * Okay. We've contacted three out of the four people you indicated that was at the apartment last night. All of them have witnesses indicating they were not there. And it's going to be my theory that you were driving that pickup, ran off the road because you

had too much to drink, got scared because you—I'm just giving you my theory. You got scared because you're a habitual offender, and a result of that accident is how you hurt your head. Then you came back and called the police. This is my theory only. It may not be right, but I'm just telling you how I feel about it. Am I close?

"A. [BY BRADSHAW]: No. You're one hell of a long ways from it.

"Q. Okay. Were you in the vehicle last night?

"A. No, I was not.

"Q. Even as a passenger?

"A. I've got witnesses to that.

"Q. Okay, can you tell me who the witnesses were?

"A. For one, my grandmother and Larry Moron or Moorehead, whichever one his last name may be.

"Q. (Inaudible)

"A. And I do want an attorney before it goes very much further." (J.A. 71-72; Ex.2, at 25-26).

Hays immediately terminated the conversation and handcuffed Bradshaw (J.A. 14, 16; Tr. 20, 22). Shortly thereafter and while still at the police station, Bradshaw asked Hays, "Well, what is going to happen to me now?" (J.A. 16; Tr. 22). According to Hays' testimony, the following occurred:

"* * * I says[*sic*] 'You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say—because—since you have requested an attorney, you know, it has to be at your own free will.' I says[*sic*] 'I can't prevent you from talking, but you understand where your place—you know, where your standing is here?' and he agreed. He says[*sic*] 'I understand,' and—you know, and we had conversation from then on. . . ." (J.A. 16; Tr. 22).

While still in the station, Hays told Bradshaw "where he was going and what he would be charged with." (J.A. 17; Tr. 23).

Hays put Bradshaw in the front seat of the patrol car "so we could talk" (J.A. 17; Tr. 23). Hays drove him to the Tillamook County Jail. While enroute, Hays reopened his theory of culpa-

bility and suggested that Bradshaw take a polygraph examination (J.A. 17; Tr. 23). Hays testified:

> * * * * * [W]e talked about, again, the theory that I had mentioned on the tape about what had happened, the accident, and whatnot, and he says—I made the statement—I says, 'Well, I can have a polygraph examiner come down and talk to you tomorrow and we can clear this matter up and find out actually what happened.' I think he made something—he said, 'What do you mean, a polygraph examiner?' and I said, 'Well, a lie detector test,' and I explained it to him and said, 'Okay, clear this matter up,' and these statements, among others, were made. . . . [T]hese statements were made while in [sic] route to the county jail in the patrol car. We had a conversation all the way there and we talked about several things, the fact that he was from Missouri and how long he had been back and he had lived in St. Helens and he knew several police officers from St. Helens, I believe, and we had general conversation all the way to the county jail." (J.A. 17-18; Tr. 23-24).

Bradshaw was lodged in the Tillamook County Jail on the charge of furnishing liquor to a minor "in lieu of $10,300 bail." (Ex.11, Police Information Report, Officer Hays, dated 9-11-80, p.4).

Hays testified Bradshaw wanted to contact Irma Stockdale, who was also leaving for St. Helens that evening, and he had "a couple of other things to do" (J.A. 18; Tr. 24). He "believed" Bradshaw may have had an opportunity to make a phone call to a lawyer, but he did not know one (J.A. 18; Tr. 24). A police officer contacted Mrs. Stockdale and informed her that Bradshaw was in jail (J.A. 19; Tr. 25).

On Monday morning, September 15, 1980, Corporal Hays briefed Trooper William Rainey, a polygraph examiner, about the facts of the investigation, but did not tell him that Bradshaw had previously requested an attorney (J.A. 20-21; Tr. 26).

Late that morning, at the county courthouse, Bradshaw submitted to a polygraph examination administered by Rainey. Rainey advised Bradshaw of his *Miranda* rights.

Bradshaw executed a written consent to the examination (J.A. 30-33; Tr. 42-45). After the examination, Rainey told Bradshaw that in his opinion, Bradshaw had not been truthful in his answers to questions about having driven Reynolds' truck. Bradshaw thereupon admitted to Rainey that, on September 13, he had passed out behind the wheel of the Reynolds truck while driving Reynolds to a party, after the two had consumed a considerab'e amount of alcohol at Reynolds' cabin (J.A. 33-35; Tr. 45-47).

Several hours later, at 1:30 a.m., Bradshaw was arraigned before the Tillamook Justice of the Peace on the furnishing liquor to a minor charge with bail set at $10,300 (Ex.11, Custody Report, Officer Hays, dated 9-15-80, p.1). That same afternoon, the Tillamook County District Attorney directed the police to charge Bradshaw with manslaughter, felony driving while revoked and driving under the influence (Ex. 11, Police Information Report, Officer Hays, dated 9-17-80, p.1-2; Officer Stephenson, dated 9-16-80, p.2). Bradshaw was then arraigned on the more serious charges arising from his confession before the Justice of the Peace after business hours, at 7 p.m., on the evening of the same day (Ex. 11, Police Information Report, Officer Nicholson, dated 9-17-80, p.1), and bail was increased to $25,300 (Ex.11, Police Information Report, Officer Stephenson, dated 9-16-80, p.1).

B. Procedural Facts:

At the pretrial *Miranda* hearing, Bradshaw contended his statements were obtained in violation of his rights under the Fifth and Fourteenth Amendments. He contended (1) the police officers improperly questioned him after he invoked the right to counsel, (2) his post-invocation statements to the officers were inadmissible, and (3) his invoked right to counsel could not be waived until an attorney had been provided (J.A. 14-15, 21-22; Tr. 20-21, 27-28).

In colloquy, the trial court reasoned that a waiver was possible if the state merely established Bradshaw "voluntarily changed his mind" (J.A. 15, 38; Tr. 21, 55). The court applied

this standard, rather than the waiver standard announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981) (J.A. 42-43; Tr. 81-82).

At the conclusion of the pretrial hearing on the admissibility of Bradshaw's statements to Trooper Rainey, the trial court ruled as follows:

> "I find that the statements made to Officer—or, to Corporal Rainey were admissible. The evidence establishes that there were no threats, promises, or inducements, that the defendant was properly advised of his rights and that he did understand them and I also find that the evidence supports a conclusion that although Mr. Bradshaw had indicated his intent to have an attorney before it goes very much further, that within a short time after he made that statement he was initiating conversations in spite of the officer's replying to him, 'I can't talk with you.' and I think that when I look at the total context of this, that there was, in fact, a change of this man's mind, that it was not brought on by any persuasion or argumentative kind of statements that were improper in any way and that the statements finally made to Officer Rainey—or, to Corporal Rainey were voluntary and followed a waiver and a knowing waiver of his right to remain silent. . . ." (J.A. 42-43; Tr. 81-82).

During Bradshaw's nonjury trial, his admissions to Rainey were introduced into evidence by a stipulation that Rainey's testimony at trial would be the same as it was in the pretrial hearing (Tr. 147-149). Bradshaw was found guilty of first degree manslaughter, driving under the influence of intoxicants, and driving while his license was revoked.

On appeal, the Oregon Court of Appeals held that Bradshaw's statements to Trooper Rainey were erroneously admitted into evidence. The Oregon court based its conclusion upon this Court's decision in *Edwards* v. *Arizona*, *supra*. The Court of Appeals reasoned that Bradshaw had not knowingly, intelligently and voluntarily waived the right to counsel:

> ". . . We do not construe defendant's question about what was going to happen to him to have been a waiver of his right to counsel, invoked only minutes before, or any-

> thing other than a normal reaction to being taken from the police station and placed in a police car, obviously for transport to some destination. Though a conversation ensued, [Hays] clearly took advantage of the opening to reinterrogate defendant about his culpability and suggest the lie detector test, which was administered the next day.
>
> "The administration of the lie detector test and the subsequent interrogation of defendant were not at his suggestion or request, but were at the instance of authorities. . . ." *State* v. *Bradshaw*, 54 Or. App. 949, 953, 636 P.2d 1011, 1013 (1982) [Petition for Certiorari, at 13].

The Oregon Supreme Court summarily denied the state's petition for review.

SUMMARY OF ARGUMENT

I

Under the rule of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), when an accused requests counsel, the authorities may not interrogate him unless the accused initiates further dialogue about the investigation. Bradshaw believes "initiation" should be defined as follows:

> "Initiation" is a statement by an accused that clearly indicates an intentional abandonment of the right to counsel, an assertion of competence, and a definite willingness to represent himself in discussions with authorities concerning the substantive criminal investigation.

Under this definition, an arrestee's statement about (1) his independent statutory or constitutional rights other than the right to counsel, (2) an irrelevant matter, or (3) a procedural matter normally attendant to arrest and detention should not be deemed initiation. Where the arrestee does not specifically ask to reopen the substantive criminal investigation, the authorities should not be permitted to interrogate him.

In the present case, Bradshaw's question, "Well, what is going to happen to me now?" was not initiation. It was a limited request about procedures normally attendant to arrest or an inartful request about how to contact counsel. The Oregon

Court of Appeals properly concluded that Corporal Hays took unfair advantage of the limited remark, and improperly reopened the substantive criminal investigation. The appellate court's decision should be affirmed.

II

When an accused requests counsel, *Miranda* imposes a *per se* bar on further interrogation in the absence of counsel. The accused has the right to consult with counsel and have him present. The "defendant-initiation" requirement is a necessary part of the right to counsel protections. The qualified *per se* rule in *Edwards* fairly interprets *Miranda's* basic premises, safeguards the right to counsel, provides a "bright line" to guide the lower courts and generates consistent precedent and articulates clear guidance for law enforcement officials.

In practice, the rule has eliminated the three divergent approaches of the lower courts. After *Edwards*, the lower courts have been able to consistently distinguish between defendant-initiated waivers and improper police-initiated interrogation. The practical utility of the rule attests to its fundamental soundness.

III

In the third argument, Bradshaw has proposed a series of rules to further clarify initiation, and to clarify the permissible scope of police behavior in custodial encounters. Bradshaw believes these suggestions are consistent with the basic premises of *Miranda* and *Edwards*.

IV

It will be assumed for purposes of argument that Bradshaw "initiated" the discussions with Officer Hays triggering the use of the totality of circumstances analysis so strongly advanced by the Attorney General. A review of the record negates any finding of a voluntary and knowing waiver:

(1) Officer Hays, unable to establish probable cause to arrest Bradshaw on the felony charges for the death of

Reynolds, accused Bradshaw of the killing and then illegally arrested Bradshaw for furnishing alcohol to a minor. There was no statutory authority to arrest him under Oregon law.

(2) Bradshaw asked for the assistance of counsel but was never given the opportunity to call either an attorney or his grandmother, who was leaving town. The police actually contacted Bradshaw's grandmother to prove Bradshaw was lying about the events surrounding Reynold's death but never told her of her grandson's request for help.

(3) After the illegal arrest and Bradshaw's remark, "Well, what is going to happen to me now?", Officer Hays suggested to Bradshaw that he take a "lie" detector test.

(4) The authorities did not promptly present Bradshaw before a magistrate on the pretext furnishing violation. he was illegally detained from Sunday evening through Monday. Eventually, at 7:00 p.m. on Monday night, he was arraigned on the felony charges that arose from the polygraph confession.

(5) During all of this time Bradshaw, an apparent alcoholic who had received a serious head injury, was without friends, family or counsel.

ARGUMENT

I

The Oregon Court Of Appeals Properly Applied The *Edwards* v. *Arizona* Waiver Rule To The Limited Factual Record Of The Present Case. Corporal Hays Improperly Reopened The Criminal Investigation By Taking Unfair Advantage Of Bradshaw's Limited Procedural Remark.

In *Edwards* v. *Arizona*, 451 U.S. 477 (1[illegible], this Court reconciled *Miranda's per se* bar against police questioning of an accused who has invoked the right to counsel with the seemingly divergent rule permitting waiver of the right and the resumption of questioning under limited circumstances. Recognizing that different procedures and stronger "critical safeguards" are involved when an accused asks for counsel as compared with a request to remain silent, this Court clarified

the concrete constitutional guidelines of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), sharply distinguished the right to silence rules of *Michigan* v. *Mosley*, 423 U.S. 96 (1975), and promulgated the qualified *per se* rule governing waiver of an invoked right to counsel. The opinion provided:

> "* * * [A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation [citation omitted], the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights [footnote omitted]. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-485.

"Initiation" by an accused was limited to remarks that "reopened the dialogue." *Id.*, at 485, n.9. In order to prove the active verb "reopened," the state should be required to prove that the remark indicates an intentional change of mind, an unequivocal willingness to abandon the previously asserted right to counsel, a clear assertion of competence, and a definite willingness to represent oneself in further discussion with the authorities concerning the criminal investigation.

The context of the *Edwards* opinion indicates that "dialogue" is limited to the substantive criminal investigation. The accused "closed" the substantive interrogation by asking for a lawyer. In order to reopen the interrogation, an accused must issue a remark that is relevant to the investigation.

This relevance requirement is based upon precedent and promotes a fair individual-state balance that is central to *Miranda* doctrine. In *Edwards*, Mr. Justice Powell indicated that "routine conversations with suspects about unrelated

matters" do not amount to police initiation. *Id.*, at 490 (Powell, J., concurring). Similarly, an officer's remark that is "normally attendant to arrest and custody" (such as a routine booking question) does not constitute police-initiated interrogation. *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980); *see also United States* v. *Hinckley*, 672 F.2d 115, 122-126 (D.C. Cir. 1982) (opinion defines the limited scope of the booking process).[4] It follows that an arrestee's irrelevant procedural remark does not invite further discussion of the substantive criminal investigation.

Additionally, an arrestee possesses certain statutory as well as state and federal constitutional rights which exist independently alongside the rights to counsel and silence. An individual in custody retains a residuum of personal dignity and privacy that is balanced against the state's legitimate security interest in managing detainees. For example, an arrestee has basic rights concerning food, shelter, medical treatment, speech and religion. In Oregon, an arrestee has a right against unnecessary rigor guaranteed by Article I, section 13 of the Oregon Constitution. *Sterling* v. *Cupp*, 290 Or. 611, 625 P.2d 123 (1981). An arrestee has a general right to call his attorney after his arrest based upon a Fourteenth Amendment liberty interest subject to reasonable restrictions. *State* v. *Newton*, 291 Or. 788, 805-807, 636 P.2d 393, 404-407 (1981). An arrestee's question about these independent rights should not be construed as a waiver of his right to counsel. His request to a jailor for a phone call does not invite further substantive

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[4] *United States* v. *Hinckley*, 672 F.2d 115, 122-123 (1982) indicated:

> "The standard booking process is 'a predominantly clerical procedure, performed immediately or soon after the suspect is delivered to the precinct, or district station'; its primary function is 'record-keeping.' The 25-minute interview with Hinckley [concerning his family and employment "background," involvement with Jody Foster] by FBI and Secret Service agents, conducted five hours after he was taken into custody, bore none of the indicia of a clerical operation."

See also W. LaFave, Arrest 379-380 (1965).

interrogation. Similarly, his remark concerning detention procedures does not invite further interrogation.

By way of illustration, Bradshaw has set forth a comprehensive list of hypothetical remarks that an accused may utter during the arrest and detention process which are irrelevant to the criminal investigation and which do not constitute initiation. *See* the examples in Appendix A. Specific examples of non-initiatory remarks include the following:

A. Well, what is going to happen to me now?

B. When may I call my lawyer?

C. When will a lawyer be appointed?

D. When will the lawyer see me?

E. When may I make a phone call?

F. May I call my grandmother?

G. May I reschedule my appointments?

H. Where are you taking me?

I. How far away is the jail?

J. Will I be able to see a doctor concerning my injured head?

K. May I be released on my own recognizance or admitted to security release?

In light of the above premises, in consideration of the examples of non-initiatory remarks, and based upon a fair interpretation of *Edwards*, this Court should define the concept of initiation by an accused as follows:

> "Initiation" is a statement by an accused that clearly indicates an intentional abandonment of the right to counsel, an assertion of competence, and a definite willingness to represent himself in discussions with authorities concerning the substantive criminal investigation.

When reviewed in this context, Bradshaw's question, "Well, what is going to happen to me now?" reflects the normal concern of an arrestee about his independent rights. Bradshaw had previously told Corporal Hays he and his grandmother,

Irma Stockdale, planned to go to St. Helens that evening and he had a couple of other things to do. Apparently, he wanted to know the procedures "normally attendant to arrest and custody" in order to contact his grandmother and reschedule his appointments. Alternatively, his question was an inartful request concerning the necessary procedures to contact an attorney and to be released on bail. Such a request would amount to a reaffirmation of the right, and not a step towards waiver.

Corporal Hays understood the limited nature of Bradshaw's remark. While still in the Rockaway police station, Hays completed the exchange by telling Bradshaw "where he was going and what he would be charged with" (J.A. 17; Tr. 23). Additional remarks were unnecessary.

It is noteworthy that Hays arrested Bradshaw for furnishing liquor to a minor, but took the opportunity to interrogate him about vehicular homicide. Bradshaw invoked the right to counsel concerning the criminal investigation. He asked a limited question concerning procedural aspects of detention on the alcohol charge. Hays answered the question in a limited fashion. Hays, who had partially reminded Bradshaw of his *Miranda* rights, placed him in the front seat of the patrol car in order to reinterrogate him concerning the vehicular homicide. After Corporal Hays started the car and began driving to the Tillamook County Jail, he resumed questioning by again confronting Bradshaw about his theory of the homicide case.

On this record, the Oregon Court of Appeals concluded that Corporal Hays—not Bradshaw—initiated further dialogue on the substantive criminal investigation. The court reasoned:

> "We do not construe defendant's question about what was going to happen to him to have been a waiver of his right to counsel, invoked only minutes before, or anything other than a normal reaction to begin taken from the police station and placed in a police car, obviously for transport to some destination. Though a conversation ensued, the police officer clearly took advantage of the opening to reinterrogate defendant about his culpability and suggest the lie detector test, which was administered the next day.

"The administration of the lie detector test and the subsequent interrogation of defendant were not at his suggestion or request, but were at the instance of authorities. The *Edwards* court emphasized that

> 'it is inconsistent with *Miranda* and its progeny for authorities, *at their instance*, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.' (Emphasis supplied.) [451 U.S. at 485].

"Thus, under the reasoning enunciated in *Edwards*, defendant did not make a valid waiver of his Fifth Amendment rights, and his statements were inadmissible." *State* v. *Bradshaw*, 54 Or. App. 949, 953, 636 P.2d 1011, 1013 (1982).

Bradshaw bvelieves the Court of Appeals properly interpreted the *Edwards* rule, and its decision should be affirmed.

II

The Determination Of Whether An Accused Has Waived His Fifth Amendment Right To Counsel Should Be Based Upon The *Per Se* Rule Of *Edwards* v. *Arizona*.

In the state's first argument, it urges the Court "to reexamine *Edwards* in light of the basic premises of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), traditional concepts of waiver of constitutional rights and the inherent faults in a *per se* rule." Petitioner's Brief at 14. According to the state, the *Edwards* majority improperly attributed greater significance to an arrestee's request for the assistance of counsel than to a simple request to remain silent. In essence, the state has suggested:

(1) The express language in *Miranda*—when an accused requests counsel "the interrogation must cease until an attorney is present"—does not constitute a *per se* proscription on further questioning;

(2) *Miranda's* prohibition against post-invocation contact and questioning would be furthered by permitting the police to confront defendant with new evidence, new charges, or "new information . . . which caused the defendant to be nonconversant in the first place." Petitioner's Brief at 31-32;

(3) The police should be permitted to immediately resume post-invocation questioning subject to review based upon the totality of the circumstances;

(4) The police should be able to take advantage of any irrelevant comment by defendant as an opportunity to reopen interrogation on the substantive criminal investigation; and

(5) The Court should disregard the added protections accorded by *Miranda's* extension of the right to counsel to Fifth Amendment cases, and, instead, analyze an arrestee's request for a lawyer as something less than an assertion of the "paramount right" to cut off questioning and to remain silent. Petitioner's Brief at 24.

The state claims that initiation is difficult to define and apply, while demonstrating that lower courts have found the "bright line" concept easy to apply. *See* cases cited in Pettitioner's Brief at 38-41, including n.13. Finally, the state suggests review of waiver under the "totality-of-circumstances" with initiation being an important fact.

The state's argument should be rejected as an exaggerated misinterpretation of the *Miranda* doctrine. This Court should reaffirm the "bright line" waiver standard announced in *Edwards* based upon the following reasons:

A. The *Edwards* rule perfectly reconciled *Miranda's* seemingly divergent rules on the cessation of questioning and the resumption of questioning in right to counsel cases.

B. The "defendant-initiated waiver" requirement is a necessary procedural safeguard to protect the right to counsel after its assertion but before counsel arrives.

C. The *Edwards* rule is clear and easy to administer.

A. The *Edwards* Rule Perfectly reconciled *Miranda's* Seemingly Divergent Rules On the Cessation Of Questioning And The Resumption Of Questioning In Right To Counsel Cases.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court extended the greater protections inherent in the Sixth Amend-

ment right to counsel to Fifth Amendment custodial encounters. To dispel the subtle compulsion inherent in custodial interrogation, the Court established "critical safeguards" attached to the right and promulgated concrete constitutional guidelines which must be followed in order to honor the exercise of the right.

When Bradshaw requested counsel, he triggered "his right to be free of contact with the authorities in the absence of an attorney" and "his right to be free of interrogation about the crime of which he was suspected." *Wyrick* v. *Fields*, ___ U.S. ___, 51 U.S.L.W. 3411-3412, (No. 82-158, November 29, 1982). In *Miranda*, the Court empahsized the "right to consult with counsel" combined with "the presence of counsel" was the necessary "protective device" to safeguard the exercise of the right. 384 U.S. at 4656, 470. The opinion provided:

> "[T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." *Id.*, at 470.

When Bradshaw invoked the right, he activated *Miranda's per se* rule mandating the cessation of all questioning which provides:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." *Id.*, at 474.

This Court has repeatedly acknowledged this *per se* proscription. *See Edwards* v. *Arizona*, 451 U.S. 477, 485 (1981); *Rhode Island* v. *Innis*, 446 U.S. 291, 298 (1980); *Fare* v. *Michael C.*, 442 U.S. 707, 719-723 (1979); *Michigan* v. *Mosley*, 423 U.S. 96, 104, n.10 (1975); *Id.*, at 109-111 (White, J., concurring). Bradshaw interprets its reach as banning all questioning, prompting or other forms of subtle compulsion that are

reasonably likely to cause an arrestee to incriminate himself or to waive his right before "consultation and presence" of counsel.

In *Miranda*, the possibility of waiver is posited opposite the *per se* bar on questioning. The opinion provided:

> "If the [post-invocation] interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U.S. at 475.

The Court's opinion went on to say:

> "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was eventually obtained." *Id.*

At first glance, these two doctrines appear seemingly divergent. Upon closer inspection, they are logically reconcilable. Under *Miranda*, only defendant-initiated waivers are permissible. Because all questioning and prompting must cease unless there is the consultation with and presence of counsel, the defendant-initiation requirement is a *necessary* part of the critical safeguard. This is especially true in the early stages of arrest and transport where the bar on contact must be compromised based upon administrative necessity. Thus, in order to absolutely honor the exercise of the right, the police may not reopen the investigation dialogue.

This interpretation does not eliminate defendant-initiated waivers. A spontaneously volunteered statement is admissible. Likewise, when defendant reopens the investigation and manifests a knowing, intelligent and voluntary waiver, his subsequent volunteered statements and responses to interrogation are admissible. The initiation requirement removes the taint of post-invocation police compulsion prohibited by *Miranda*. The requirement assures a fair individual-state

balance and assures that defendant "reopened the dialogue" based upon a clear change of mind free of compulsion.

In announcing the qualified *per se* rule governing waiver, this Court in *Edwards* v. *Arizona*, 451 U.S. 477, 484-485 (1981), clarified and reconciled the above-mentioned *Miranda* doctrines. The opinion represents a reasonable and faithful interpretation of *Miranda*. It should be affirmed.

It is noteworthy that the opinion clarified the confusion among the lower courts. Before *Edwards*, the lower courts adopted three positions concerning waiver of the right to counsel. Each position reflects a differnt pattern of emphasis between *Miranda's per se* bar on questioning and its limited waiver rules.

The first approach adopted a strict *per se* prohibition on police reinterrogation even where defendant initiated further conversation. *See United States* v. *Massey*, 550 F.2d 300, 307-308 (5th Cir. 1977)(request for counsel postpones interrogation until counsel is present); *United States* v. *Priest*, 409 F.2d 491, 493 (5th Cir. 1969)(no questioning permitting after request for counsel).[5]

The second approach adopted the qualified *per se* rule allowing defendant-initiated waivers, but adopted a flat prohibition

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[5] Other cases applying a flat prohibition on post-invocation questioning under all circumstances include:

Moore v. *State*, 261 Ark. 275, 551 S.W.2d 185 (1977); *Webb* v. *Stone*, 258 Ark. 95, 522 S.W.2d 406 (1975); *People* v. *Brake*, 191 Colo. 390, 553 P.2d 763 (1976); *State* v. *Boone*, 220 Kan. 758, 556 P.2d 864, 873 (1976); *People* v. *Cook*, 78 Ill. App. 3d 695, 397 N.E.2d 439 (1979); *Stevens* v. *State*, 265 Ind. 396, 354 N.E.2d 727 (1976); *Murphy* v. *State*, 336 So.2d 213 (Miss. 1976), *cert. denied*, 429 U.S. 1076 (1977) (statements are not voluntary when made after a request for attorney which is not honored).

One limited exception applied. When the request for counsel was equivocal, the police were permitted to ask clarifying questions to the extent necessary to clear up any confusion as to the suspect's intentions. *Thompson* v. *Wainwright*, 601 F.2d 768, 771 (5th Cir. 1979).

against resumed questioning, unless the defendant requested it. *See United States* v. *Womack*, 542 F.2d 1047 (9th Cir. 1976); *United States* v. *Clark*, 449 F.2d 802, 807-808 (4th Cir. 1974)(police-initiated interrogation after assertion of right to counsel made subsequent responses to interrogation involuntary); *United States* v. *Blair*, 470 F.2d 331, 338 (5th Cir. 1972) *cert. denied* (1973)(Miranda's prohibition on post-assertion interrogation "could hardly have been more uncompromising"); *People* v. *Petlingill*, 21 Cal. 3d 231, 578 P.2d 108, *cert. deined*, 429 U.S. 847 (1976); *People* v. *Fioritto*, 68 Cal.2d 714, 441 P.2d 625 (1968). This is the approach suggested by the American Law Institute. *See* ALI Model Code of Pre-Arraignment Procedure, § 140.8 (1975) set forth as Appendix B herein.[6]

The third approach allowed renewed interrogation after a request for counsel subject to review based on the totality-of-circumstances. *See, e.g., White* v. *Finkbeiner*, 611 F.2d 186 (7th Cir. 1979), *vacated and remanded*, 451 U.S. 1013 (1981), *on remand*, 687 F.2d 885 (7th Cir. 1982); *United States* v. *Wilson*, 571 F.2d 455 (9th Cir. 1978); *United States* v. *Grant*, 549 F.2d 942 (4th Cir.), *cert. denied*, 432 U.S. 908 (1977).[7]

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[6] Other cases adopting a flat prohibition against resumed questioning, unless the defendant requests it, include *People* v. *Harris*, 191 Colo. 234, 552 P.2d 10 (1976); *People* v. *Salazar*, 189 Colo. 429, 541 P.2d 676 (1975) (defendant must affirmatively withdraw a request for counsel); *People* v. *Medina*, 37 Ill. App. 3d 1029, 347 N.E.2d 424 (1976); *Commonwealth* v. *Mercier*, 451 Pa. 221, 302 A.2d 337 (1973); *State* v. *Marcum*, 24 Wash. App. 441, 601 P.2d 975 (1979) (all questioning must stop but defendant may initiate waiver); *see generally*, Comment, *Waiver of Rights in Police Interrogations: Miranda in the Lower Courts*, 36 U. Chi. L. Rev. 413, 437-441 (1969).

[7] *See also United States* v. *Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.), *cert. denied* 436 U.S. 919 (1978); *Cobbs* v. *Robinson*, 528 F.2d 1331 (2d Cir. 1975), *cert. denied* 424 U.S. 947 (1976); *but see Nash* v. *Estelle*, 597 F.2d 513 (5th Cir.), *cert. denied* 444 U.S. 981 (1979).

The first approach placed strong emphasis on the prohibition of interrogation without accomodating the waiver doctrine. The third approach placed excessive emphasis on the waiver doctrine, while impermissibly weakening the *per se* proscription against questioning. As this Court recognized in *Edwards*, only the second approach reconciled the competing doctrines to provide a fair and reasonable interpretation of *Miranda*.

B. The "Defendant-Initiated Waiver" Requirement Is A Necessary Procedural Safeguard To Protect The Right To Counsel After Assertion But Before Counsel Arrives.

The critical safeguards and constitutional rules attached to the right to counsel offer greater protections than their counterparts in a right to silence case. There, the safeguard is the arrestee's "right to cut off questioning." *Michigan* v. *Mosley*, 423 U.S. 96, 103 (1975). When the arrestee expresses a desire to remain silent, *Miranda* requires "the interrogation must cease." 384 U.S. at 473. *Mosley* requires the authorities to scrupulously honor the exercise of the right. Thus, in most cases, the resumption of interrogation will violate the right.

Bradshaw interprets the *Mosley* exception as being limited to its extremely unusual facts. The opinion does not aid the state, because this case involves a right to counsel issue. Additionally, Corporal Hays' behavior violates *Mosley* as well as *Edwards*, because the factual prerequisites of *Mosley* are absent.[8]

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[8] One commentator has interpreted *Michigan* v. *Mosley*, 423 U.S. 96 (1975) as follows:

"*Mosley* held that when a suspect invokes his right to remain silent (as opposed to his right to counsel), police interrogation may be resumed at least in the following circumstances: (1) the original interrogation is promptly terminated; (2) the questioning is resumed only after 'the passage of a significant period of time'; (3) the suspect is given another set of *Miranda* warnings at the outset of the second interrogation; (4) a different officer resumes the questioning; and (5)

In *Mosley*, Mr. Justice White analyzed the foundation for the dichotomy of rights. When an individual merely invokes the right to silence, he is acknowledging his competence to represent himself in future discussions with the authorities. *Id.*, at 109, n.1 (White, J., concurring). Where the accused proceeds on a *pro se* basis, it is reasonable to keep the lines of communications open in order to advise him that a verifiable alibi would lead to his release or that the case against him is strong and his cooperation in apprehending and convicting others would redound to his benefit in the form of a reduced charge. *Id.* While an accused is accorded the opportunity to negotiate a better deal, this does not authorize repeated rounds of post-invocation interrogation to compel a confession. A fair individual-state balance is maintained.

The opinion contrasts a request for counsel:

> "The question of the proper procedure following expression by an individual of his desire to consult counsel is not presented in this case. It is sufficient to note that the reasons to keep the lines of communications between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect therein. The authorities may then communicate with him

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the second interrogation is limited to a crime that has not been the subject of the earlier interrogation.

"Although it has forcefully been argued that the fact that the second questioning session in *Mosley* was restricted to a separate and 'unrelated' crime was 'critical,' see Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 134, circumstances (1)(2) and (3) may suffice to permit the resumption of questioning. Factors (1), (2) and (3) would seem to be *the minimum requirement* for renewed questioning when a suspect indicates that he wishes to remain silent."

Kamisar, "*Edwards* v. *Arizona* in the Lower Courts: Applying a Reinvigorated *Miranda*," in J. Choper, Y. Kamisar & L. Tribe, *The Supreme Court: Trends & Developments 1981-1982*, at ____, n.3 (1983) [hereinafter *Edwards in the Lower Courts*]. *See also Id.*, n.8.

> through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Id.*, at 110, n.2.

In asking for a lawyer, the arrestee has uttered a "cry for help." He has acknowledged his position of weakness and his incompetence to make his own decisions. Even a "street-wise" arrestee has acknowledged he needs a lawyer to properly represent his interests. By invoking the right, he has already exercised the option of self-determination by deciding he needs consultation with and the presence of a lawyer in further discussions with the authorities about the alleged crime. Any necessity for keeping open lines of communication may be fulfilled in this situation by contacting the suspect's attorney, and further questioning of the defendant is never required.

An attorney can ascertain the nature of the charges and the strength of the state's case. After privileged discussions with the client concerning the extent of his involvement, the attorney would have the requisite informational basis upon which to recommend cooperation, discussion of an alibi, negotiations, or trial.

This Court recently emphasized the fundamental importance of counsel in safeguarding the exercise of the right. Mr. Justice Blackmun writing for the majority in *Fare* v. *Michael C.*, 442 U.S. 707 (1979) noted:

> "The rule in Miranda, however, was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client becomes enmeshed in the adversary process, the Court found that 'the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system's established by the Court. Id., at 469. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually

obtained are accurately transcribed for presentation into evidence. Id., at 470.

> "The per se aspect of Miranda was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country. Whether it is a minor or an adult who stands accussed, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts. For this reason, the Court fashioned in Miranda the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." 442 U.S. at 719.

As discussed above, the *Edwards* procedural testimony for the two rights is reasonable and consistent with *Miranda*. In the right to counsel context, Bradshaw believes consultation between lawyer and client is a necessary prerequisite to restore a fair individual-state balance. Only the lawyer can dispel the compulsion inherent in custodial questioning of the accused. An officer's prompting or other forms of subtle compulsion certainly worsens the individual-state balance from the defendant's point-of-view. For this reason, the defendant-initiation requirement is a necessary part of the right to counsel protections.

C. The *Edwards* Rule Is Clear And Easy To Administer.

In addition to its inherent fairness, the *Edwards* rule is clear and easy to administer. This Court has readily applied it to a variety of fact situations:

This Court has consistently applied the *Edwards* standard. *See Wyrick* v. *Fields, supra; Williams* v. *Ohio*, 452 U.S. 935 (1981); *Blakney* v. *Montana*, 451 U.S. 1013 (1981); *White* v. *Finkbeiner*, 451 U.S. 1013 (1980); *Leuschner* v. *Maryland*, 451 U.S. 1014 (1981); *Monroe* v. *Idaho*, 451 U.S. 1014 (1981); *Wantland* v. *Maryland*, 451 U.S. 1014 (1981) and *James* v. *Illinois*, 451 U.S. 1014 (1981). In *Wyrick*, defendant's request to submit to interrogation in the form of a polygraph examination was clearly a defendant-initiated waiver. In the remaining cases, law enforcement officers improperly initiated interrogation after defendants had requested the right to counsel.

The judgments were vacated and the cases remanded in light of *Edwards*. These cases demonstrate the simplicity of application and the guiding power of *stare decisis* in generating meaningful precedents.

The lower courts have had no trouble in distinguishing between improper police-initiated interrogation, *United States* v. *Hinckley*, 672 F.2d 115 (D.C. Cir. 1982); *United States* v. *Downing*, 655 F.2d 404 (1st Cir. 1981); *Stumes* v. *Solem*, 671 F.2d 1150 (8th Cir. 1982); and defendant-initiated waivers, *United States* v. *Gordon*, 665 F.2d 478 (2d Cir. 1981); *United States* v. *Thierman*, 678 F.2d 1331 (9th Cir. 1982).

Similarly, the state courts have had no post *Edwards* trouble in applying the "initiation" standard. Examples of cases where the courts have found improper police-initiated interrogation after defendant asserted the right to counsel include: *State* v. *Brannam*, 275 Ark. 16, 627 S.W.2d 8 (1982) (repeated rounds of questioning); *Scroggins* v. *State*, 633 S.W.2d 33, 37 (Ark. 1982); *People* v. *Cerezo*, 635 P.2d 192 (Colo. 1981) (intentional police initiation and taking advantage of defendant's inquiry of "How things looked for her"); *Silling* v. *State*, 414 So.2d 1182 (Fla. App. 1982) (officer asked, "Why she did it?"), *Wilson* v. *Zant*, 290 S.E.2d 442, 446 (Ga. 1982); *Vaughn* v. *State*, 281 S.E.2d 594, 597 (Ga. 1981); *State* v. *West*, 408 So.2d 1114 (La. 1982) (officer threatened to arrest defendant's mother and offered a deal if defendant gave a statement); *State* v. *McCloskey*, 90 N.J. 18, 446 A.2d 1201 (1982); *State* v. *Taylor*, 56 Or. App. 703, 643 P.2d 379 (1981) (officer-initiated interrogation); *State* v. *Fitzgerald*, 60 Or. App. 466, ___ P.2d ___ (1982); *Goodnough* v. *State*, 627 S.W.2d 841 (Texas Cr. App. 1982) (prompting); *Casillo* v. *State*, 616 S.W.2d 620, 623 (Texas Cr. App. 1981) (officer confronted defendant with new evidence).

State courts readily found defendant-initiated waivers. Examples include: *State* v. *Piatt*, 132 Ariz. 145, 644 P.2d 881 (1982) (defendant asked Tucson detectives to "call him"); *Coble* v. *State*, 274 Ark. 134, 624 S.W.2d 421, 424 (1981); *Richardson* v. *State*, 274 Ark. 473, 625 S.W.2d 504, 506 (1981); *Jennings* v. *State*, 413 SO.2d 24 (Fla. 1982); *Barksdale* v. *State*, 161 Ga.

155, 291 S.E.2d 18 (1982) (defendant repeatedly initiated discussions with sheriff); *Caffo* v. *State*, 247 Ga. 751, 279 S.E.2d 678, 682, n.1 (1981) (defendant requested that the interview begin again); *State* v. *Dowles*, 56 N.C. App. 578, 289 S.E.2d 883 (1982) (defendant) indicated willingness to answer selective questions).

The primary reason why the *Edwards* test works so well is that the lower courts have interpreted it as establishing a *per se* rule.[9] Under the rule, the state must clearly establish two threshold facts, i.e., (1) the police refrained from post-invocation interrogation in the absence of counsel, and (2) defendant reopened the dialogue. Thereafter, it must establish by clear and convincing evidence that an arrestee made a knowing, intelligent and voluntary waiver. *Edwards* v. *Arizona*, *supra*, 451 U.S. at 482-483.

The Court should specifically reaffirm the *Edwards per se* rule in order to fairly interpret *Miranda's* basic premises, to safeguard the important right to counsel, to provide a "bright line" to guide lower courts and generate meaningful precedent, and to clearly limit police conduct.[10]

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[9] Most commentators have also interpreted *Edwards* as establishing a *per se* rule. *See* Kamisar, *Edwards* v. *Arizona in the Lower Courts;* Comment, *Edwards* v. *Arizona: The Burger Court Breathes New Life Into Miranda*, 69 Cal. L. Rev. 1734 (1981); Comment, *Fifth Amendment—Waiver of Previously Invoked Right to Counsel*, 72 Jour. of Crim. Law & Criminology 1288 (1981); Comment, *Criminal Procedure—Self-Incrimination: Miranda Lives*, 33 U. Fla. L. Rev. 788 (1981).

[10] In the absence of such blanket prohibition on certain categories of police behavior, studies indicate law enforcement officials have tended to "push to the limit" any constitutional restraint on their actions. For example, despite having to give *Miranda* warnings, police are still able through a variety of techniques to induce the overwhelming majority of suspects to waive the right to counsel. After an arrestee requests counsel, the use of interrogation tactics

III

This Court Should Further Clarify And Strengthen The *Edwards* Waiver Rule.

In Petitioner's Brief, the state suggests "initiation is difficult to define, and its application will chill all custodial communication." Petitioner's Brief at 28-32. The state's concern are chimerical.

As indicated above, in Arguments I and II-1A, this Court and the lower courts have found "initiation" easy to define and apply. The "bright line" objective standard works well in both theory and practice. On the second point, initiation is not overbroad. It serves *Miranda's* laudatory purpose of forbidding authorities from reopening the substantive investigation through prompting, interrogation, and other forms of subtle compulsion that are reasonably likely to cause the arrestee to

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leads to impermissible waiver. Thus, restraint on police-initiated contacts is necessary to further *Miranda's per se* proscription.

See White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581, 598 (1979); Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 Den. L. J. 1, 26-34 (1979); *Oregon State Police Manual* 101-103 (1979); Stephens, Flanders & Cannon, *Law Enforcement and the Supreme Court: Police Perceptions of the Miranda Requirements*, 39 Tenn. L. Rev. 407 (1972); Medalie, Zeitz and Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347, 1394-95 (1968); Inbau & Reid, *Criminal Interrogation and Confessions*, 31, 106 (2d ed. 1967); Project, *Interrogation in New Haven: The Impact of Miranda*, 76 Yale L. J. 1519, 1614 (1967); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. Pitt. L. Rev. 1 (1967); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59, 94-104 (1966); Lynch, *Interrogation of Criminal Defendants—Some Views on Miranda* v. *Arizona*, 35 Fordham L. Rev. 221 (1966); Younger, *Interrogation of Criminal Defendants—Some Views on Miranda* v. *Arizona*, 35 Fordham L. Rev. 255 (1966); Aubrey and Caputo, *Criminal Interrogation* (1st ed. 1965).

waive the right or incriminate himself. Both the defendant and the officer may discuss matters normally attendant to arrest and detention without reopening the investigation. Only potentially incriminatory police pressure is forbidden. In this respect, *Edwards* strikes a fair balance.

In practice, the vast majority of cases will be clear. It should be relatively simple to determine whether defendant reopened the investigatory dialogue or whether he commented upon an irrelevant matter. In the few cases where the remark was vague, the remark should be deemed non-initiatory. This construction is consistent with the heavy burden placed upon the state to prove a clear waiver.

This case presents an opportunity for the Court to clarify and strengthen the *Edwards* waiver rule. Bradshaw believes the following proposed rules would further safeguard the invoked right to counsel and clearly limit police behavior in a manner consistent with the Miranda doctrine.

A. In general, the police officer should refrain from all irrelevant remarks during arrest, transportation, booking and detention, where an arrestee has invoked the right to counsel.

B. The officer should refrain from all interrogation, prompting or other forms of subtle compulsion reasonably likely to cause an arrestee to incriminate himself or to waive the right.

C. The officer may only initiate statements that are necessarily attendant to arrest and detention procedures.

   1. The statement must be:

      a. Necessarily attendant to arrest and detention procedures;

      b. Nondeferrable until defendant has had an opportunity to consult with and contact an attorney;

      c. Normally directed at an arrestee rather than his attorney (e.g., statements involving fingerprinting, strip search, etc.); and

d. Limited to minimum breadth necessary to convey or ascertain the essential information.

2. The statement must not be:

a. Reasonably likely to incriminate or to induce waiver of the right to counsel; or

b. A subterfuge to promote further interrogation or waiver.

D. If defendant makes a statement concerning an irrelevant matter or involving his independent statutory or constitutional rights, the officer should limit his remarks as follows:

1. The officer should only respond to a question that requires an immediate response.

2. The response should be

a. Limited in accordance with the principles in rules A, B and C; and

b. Limited to the narrow subject matter of the question.

3. Where a response would be reasonably likely to cause defendant to waive his right, or incriminate himself, the officer should not directly respond. Instead, he should advise the arrestee:

"I cannot respond to that remark. You should discuss the matter with your attorney."

4. The officer should not discuss anything relevant to the criminal investigation in the absence of counsel.

E. If an arrestee clearly expresses a desire to reopen the substantive criminal investigation, the officer should not interrogate the person until the following steps have occurred.

1. The officer readvised the arrestee of his complete *Miranda* warnings;

2. The officer asked these clarifying questions:

a. "Do you fully understand these rights?"

b. "Do you now wish to abandon your right to consult with an attorney and to have him pre-

sent during further questioning about your charge(s)?"

c. "Do you expressly and voluntarily waive the right to counsel during further questioning about your charge(s)?"

d. "Do you wish to proceed on your own behalf?"

e. "Are you now willing to answer further questions about the charge(s)?"

3. After an arrestee has affirmatively answered the above questions, the officer may resume the interrogation.

IV

The "Totality Of Circumstances" Test—A Pretext Arrest And Unexplained Delay In Arraignment.

It will be assumed for the sake of argument that Bradshaw's remark, "Well, what is going to happen to me now?" is the triggering mechanism to shift the analysis from the "*per se*" rule to the "totality of circumstances" test. It will be seen that the Attorney General's criticism and suggested abandonment of this Court's rationale in *Edwards* supporting the *per se* rule when the right to counsel is invoked and requiring viewing a government claim of waiver with "skepticism," is clearly unfounded (Petitioner's Brief at 25-26).

Oregon's Attorney General correctly puts Officer Hays' good faith in issue[11] under the "totality of circumstances" test in an attempt to distinguish the "extremely suspect police procedures" in *Edwards* v. *Arizona*, 451 U.S. 477 (1981).[12] Officer

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[11] "In examinining the totality of the circumstances in a case of post-invocation waiver, the origin of the renewed conversation is a highly relevant factor. In some cases of heavy-handed police misconduct, it may very well be the determining factor and thus would require suppression of a subsequent confession." (Petitioner's Brief at 33-34).

[12] "Arrested on murder, burglary, and robbery charges, Edwards was advised of his *Miranda* rights and, after some initial questioning, requested counsel. The police then ceased the interrogation. When

Hays' conduct is also important because the threshold question of who ultimately initiated the agreement for Bradshaw to take the polygraph examination[13] through another police officer hinges on Officer Hays' less than articulate recollection of the purported unrecorded "conversation" between Officer Hays and Bradshaw shortly after his arrest and request for counsel.

Sometime after 9 p.m. on Sunday, September 14, 1980, Bradshaw was arrested for furnishing alcohol to a minor and "lodged in the Tillamook County Jail in lieu of $10,300 bail" (Ex.11, Information Report, Officer Hays, dated 9-17-80, p.4). Defendant confessed "late" the following morning after being given the results of the polygraph test (J.A. 30; Tr. 42). At 1:30 p.m., he was arraigned before the Tillamook Justice of the

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two detectives asked to see defendant the next morning, he told a guard he did not wish to speak to anyone. The guard replied defendant 'had to' talk to the detectives. The police then readvised defendant of his *Miranda* rights, and he ultimately gave an incriminating statement." (Petitioner's Brief at 21).

[13] The use of a polygraph examination does not *per se* create any impropriety in inducing Bradshaw's confession. This is so even though the results of a polygraph test are generally inadmissible because it "has not yet attained general scientific acceptance as a reliable and accurate means of ascertaining truth of deception * * *", *State* v. *Green*, 271 Or. 153, 166, 531 P.2d 245 (1975), citing with approval Reid and Inbau, *Truth and Deception: The Polygraph ("Lie-Detector") Technique* 254 (1966). But a defendant fully advised of his constitutional rights after being told that his polygraph test results showed "deceptive patterns" may or may not be compelled by mental coercion. *State* v. *Clifton*, 271 Or. 177, 531 P.2d 256 (1975); *State* v. *Green*, *supra*; *State* v. *Keiper*, 8 Or. App. 354, 493 P.2d 750 (1972).

The actual polygraph results are not a part of the record. However, based on the police assumption that Bradshaw was lying about the events surrounding Reynolds' death, what would Officer Rainey have told Bradshaw about the results had he passed the test? In any event, the use of an unreliable device to extract a confession should carry great weight on the totality scale negating a finding of waiver.

Peace on the charge of furnishing liquor to a minor with bail set at $10,300 (Ex.11, Custody Report, Officer Hays, dated 9-15-80, p.1).

That afternoon, the Tillamook County District Attorney directed the police to charge Bradshaw with manslaughter, felony driving while revoked and driving under the influence (Ex.11, Police Information Reports, Officer Hays, dated 9-17-80, p. 1-2; Officer Stephenson, dated 9-16-80, p.2). Bradshaw was then arraigned on the more serious charges, arising from his confession at 7 p.m. (Ex.11, Police Information Reports, Officer Nicholson, dated 9-17-80, p.1). Bail was increased to $25,300 (Ex.11, Police Information Report, Officer Stephenson, dated 9-16-80, p.1).

The record is silent as to why Bradshaw was not arraigned earlier Monday morning at the Tillamook County Courthouse where the polygraph was later given.

The record discloses that Officer Hays made a pretext arrest of Bradshaw for furnishing alcohol to a minor[14] which was illegal and void from its inception under Oregon law. The

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[14] Oregon Revised Statutes 471.410(2), (3)(a):

"(2) No person other than his parent or guardian shall sell, give or otherwise make available any alcoholic liquor to any person under the age of 21 years. A person violates this subsection if he sells, gives or otherwise makes available alcoholic liquor to a person with the knowledge that the person will violate this subsection.

"(3) Upon violation of subsection (2) of this section, the court shall impose a mandatory minimum sentence as follows:

"(a) Upon a first conviction for the offense, a fine of $200."

charge of furnishing alcohol to a minor is an unclassified violation[15] carrying a maximum penalty of a $250 fine.[16]

Officer Hays' statutory authority to arrest Bradshaw without a warrant was limited under ORS 133.310(1)(a), (b) as follows:

> "(1) A peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed:
>
> "(a) A felony, a Class A misdemeanor[17] or an unclassified offense for which the maximum penalty allowed by law is equal to or greater than the maximum penalty

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[15] Oregon Revised Statutes 161.565:

"An offense is a violation if it is so designated in the statute defining the offense or if the offense is punishable only by a fine, forfeiture, fine and forfeiture or other civil penalty. Conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime."

Oregon Revised Statutes 161.575:

"(1) Any violation defined in the Oregon Criminal Code is expressly designated in the section defining the offense. Any offense defined outside this code which is punishable as provided in ORS 161.565 shall be considered a violation.

"(2) Violations are not classified."

[16] Oregon Revised Statutes 161.635(3):

"(3) A sentence to pay a fine for a violation shall be a sentence to pay an amount, fixed by the court, not exceeding $250."

[17] Oregon Revised Statutes 161.615(1):

"Sentences for misdemeanors shall be for a definite term. The court shall fix the term of imprisonment within the following limitations:

"(1) For a Class A misdemeanor, 1 year."

allowed for a Class A misdemeanor, or a major traffic offense as defined in ORS 484.010(5);[18] or

"(b) Any other offense *in the officer's presence* . . ."

The charge of furnishing alcohol to a minor did not qualify as a violation for which defendant could be arrested without a

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[18] Oregon Revised Statutes 484.010(5):

"(5) 'Major traffic offense' means a violation of any of the following provisions of law or a city ordinance conforming thereto:

"(a) Reckless driving as defined in ORS 487.550.

"(b) Driving while under the influence of intoxicants, as defined in ORS 487.540.

"(c) Failure to perform the duties of a driver involved in an accident or collision, as defined in ORS 483.602 (1) and (2) and 483.604.

"(d) Driving while suspended or revoked, as defined in ORS 487.560.

"(e) Fleeing or attempting to elude a police officer, as defined in ORS 487.555.

"(f) Driving after being declared to be a habitual offender, as set forth in ORS 484.740."

Oregon Revised Statutes 487.550(2):

"(2) Reckless driving is a Class A misdemeanor."

Oregion Revised Statutes 487.540(2):

"(2) Driving while under the influence of intoxicants is a Class A misdemeanor."

Oregon Revised Statutes 487.560(5), (6):

"(5) Except as provided in subsection (6) of this section, driving while suspended or revoked is a Class A misdemeanor.

"(6) Driving while suspended or revoked is a Class C felony if the suspension or revocation was the result of a finding that the person is an habitual traffic offender under ORS 484.730 or of a conviction for any of the following offenses:

"(a) Any degree of murder, manslaughter, criminally negligent homicide or assault resulting from the operation of a motor vehicle.

warrant. This leaves all of the factual circumstances relied on by the Attorney General to show initiation, waiver and the actual confession in an atmosphere of unlawful detention.[19]

"(b) Any crime punishable as a felony with proof of a material element involving the operation of a motor vehicle.

"(c) Failure to perform the duties of a driver involved in an accident or collision which results in physical injury or death to any person.

"(d) Reckless driving.

"(e) Fleeing or attempting to elude a police officer.

"(f) Driving while under the influence of intoxicants."

Oregon Revised Statutes 487.555(4):

"(4) Fleeing or attempting to elude a police officer is a Class A Misdemeanor."

Oregon Revised Statutes 487.740:

"Except as provided in ORS 484.735(2), it shall be unlawful for any person to operate a motor vehicle in this state while the order of the court prohibiting such operation remains in effect. A person who violates this section commits a Class C felony."

[19] Trial defense counsel at no time presented a direct claim that obtaining Bradshaw's confession, a fruit of an illegal arrest, violated Oregon's arrest statutes or any constitutional provision, state or federal. *See Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Taylor* v. *Alabama*, 454 U.S. 903 (1982); *Dunaway* v. *New York*, 442 U.S. 200 (1979); *Brown* v. *Illinois*, 422 U.S. 590 (1975); *Nardone* v. *United States*, 308 U.S. 338 (1939); *State* v. *Lloyd*, 22 Or. App. 254, 538 P.2d 1278 (1975). For this reason and the fact that the issue at the appellate court level has always been addressed as a "*per se*" problem under *Edwards*, the assertion was not separately assigned as error in Oregon's appellate courts.

Defendant does not contend that a violation of Oregon's arrest statutes necessarily abridges Fourth Amendment and Due Process standards. *See Street* v. *Surdyka*, 492 F.2d 368 (4th Cir. 1974). But the Attorney General has opened the door in his quest for an analysis of this case under the "totality of the circumstances" test. The invasion of Bradshaw's personal liberty including the indignity of Offic-

It might be argued by the state to rebut this claim, that there are no facts in the record to show Officer Hays did not in good faith believe he had the authority to arrest Bradshaw for furnishing alcohol to a minor.[20]

In Officer Hays' Special Report[21] describing the discussions of 5:45 p.m., Sunday, September 14, 1980, with Bradshaw at Reynolds' cabin and prior to taking Bradshaw to the police station, Officer Hays wrote: "Bradshaw wanted to know if he would be in trouble for furnishing liquor to a minor since he had bought a fifth and a pint of Black Velvet whiskey which he had given Renolds to drink."

It is clear at this point Officer Hays had probable cause to cite Bradshaw on the charge of furnishing. Bradshaw's statements were corroborated by the empty bottles discovered in Reynolds' cabin and by the blood alcohol content of Reynolds' blood.

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er Hays' warrantless arrest, handcuffing, probable fingerprinting, photographing, search and imprisonment in jail clothes without bail or with excessive bail dispels any notion of a valid waiver.

[20] Officer Hays' good intent is initially refuted in that Hays had the authority to issue a citation in lieu of arrest which any reasonable officer would have done on a violation that carried a maximum penalty of a $250 fine.

Oregon Revised Statutes 133.055:

"(1) A peace officer in lieu of taking the person into custody may issue and serve a citation to the person to appear at the court of the magistrate before whom the person would be taken pursuant to ORS 133.450."

Oregon Revised Statutes 133.045(1):

"ORS 133.055 shall apply in any instance when a person is subject to arrest on a misdemeanor or violation charge or on a felony charge which may be deemed a misdemeanor charge after sentence is imposed and:

"(1) The arrest is made without a warrant pursuant to ORS 133.310; or * * * ."

[21] Ex.11, dated 9-17-80.

Instead of arresting Bradshaw, Officer Hays emphasized that Bradshaw was not in custody but had voluntarily come to the police station. Officer Hays even advised Bradshaw of his *Miranda* rights (J.A. 10-11; Tr. 16-17).

Officer Hays was then given eight additional opportunities to arrest Bradshaw for furnishing at the police station:

> "A. [BRADSHAW]: I contacted him at, let's see, he got off work at 5:00. I caught him coming home at 5:30, and I asked him if he wouldn't like to drink a little bit of whiskey.
>
> "[HAYS]: Okay.
>
> "* * * * *.
>
> "A. You know. And, so I walked up the liquor store, and I picked up a pint and a fifth of whiskey, Black Velvet . . . .
>
> "Q. Uh huh.
>
> "* * * * *.
>
> "A. And then after she came home, well me and Lowell went over, and we was drinking some whiskey.
>
> "* * * * *.
>
> "A. And, anyway we was, we was over there and we was drinking whiskey and everything. He went down to the phone booth to call his girl friend, but, I presume it was his girl friend that was there.
>
> "* * * * *.
>
> "A. You know. And he came back up, and we was setting there and we was listening to some rock and roll music and looking at TV at the same time and drinking whiskey.
>
> "Q. Uh huh.
>
> "* * * * *.
>
> "Q. During the period of time that uh, these two girls and these two guys were there, do you recall what, what happened when all, when all six of you were there. You

had two guys, two girls, you, and Lowell. Were you just drinking whiskey or . . .

"* * * * *.

"Q. Sure. Now, do you uh, remember some beer that was there, uh, you said that was drank last night, where did this beer come from?

"A. The Olympia beer that was there? I went down to the store . . .

"Q. There was a Schlitz and there was an Oly.

"A. There was a Schlitz?

"Q. Yeah. Schlitz bottle sitting on . . .

"A. I don't know where the Schlitz come from, because I drink Olympia myself.

"Q. Uh huh. Did you buy . . .

"A. And . . .

"Q. Buy some . . .

"A. Yes. I went down to the store earlier that day, around 4:00 or 4:15, and I picked up a six-pack of Olympia. And I was sitting there drinking it, and then when Lowell got off work, I asked him if he wouldn't like a beer, and he goes, 'Yeah,' and we got sitting over there and got talking about whiskey . . .

"Q. Uh huh.

"A. And stuff, and I asked him if he felt like drinking a little bit of whiskey, and he said yes. So that's when I went down to the liquor store and bought a fifth and a pint.

"Q. Uh huh.

"A. (inaudible)

"Q. Do you know how old Lowell is?

"A. I think that, I'm not really for sure, but I think he said he was only 20 years old.

"Q. Yeah. That's how old he is.

"A. You know, and that's the reason why I asked the officer there that, if there'd be any charges brought against me, you know, for buying a minor alcohol.

"Q. This is possible.

"A. (inaudible)

"Q. It's very possible.

"A. If it is, I'm willing to face the, you know.

"Q. Okay. Well, we'll work with that later, all right?

"A. I mean because . . .

"Q. The thing is we want to determine exactly what happened last night. So, in going over your mind, as best you can remember, the people that were in the apartment at the time you got hit on the head was Lowell . . .

"A. Uh huh.

"Q. A girl named Julie or Julia, something like that . . .

"A. Judy or Julie.

"Q. Judy, another girl who you thought's name was Kim . . .

"* * * * *.

"Q. Uh huh. Okay. Is there anything else that happened this evening that uh, or happened yesterday evening that you happened to think about?

"A. Nothing that I know of, only that me and Lowell was partying last night, you know.

"A. Uh huh. Partying pretty heavy, huh?

"A. Well, not, not what . . .

"Q. Well . . .

"A. You really call heavy . . .

"Q. (inaudible) well, a fifth and a . . .

"A. We was setting around.

"Q. Pint of Black Velvet and some beer would be . . .

"A. Yeah.

"Q. To me would be pretty heavy.

"A. Well, yeah.

"Q. Maybe not to you, but to me.

"A. I guess it would be, really, you know . . .

"Q. Between the two of you.

"A. But other than that . . . ."

(J.A. 48-65; Ex. 2, at 3-19)

Officer Hays' interrogation can be characterized as remarkably friendly. He carefully recorded Bradshaw's suspected inconsistencies about the assault which was already rebutted by other witnesses who had been contacted (J.A. 53-55; Ex. 2, at 8-10). The officer also established that Bradshaw could not legally drive an automobile on Oregon highways (J.A. 63; Ex. 2, at 18).

As the interrogation drifted towards its conclusion, Officer Hays was caught on the horns of a dilemma. Hays knew he had enough evidence to charge Bradshaw with furnishing but he did not have probable cause to arrest Bradshaw in connection with Reynolds' death. On the tape, Hays refers to talking with another person when he shut off the recorder (J.A. 70; Ex. 2, at 24). And while the record is silent during this gap in the tape, the decision was no doubt made to reverse Officer Hays' amiable approach by accusing Bradshaw of killing Reynolds and at the same time arresting him on the violation with the hope that a confession would result. The plan backfired when Bradshaw exercised his *Miranda* rights.

Bradshaw's illegal detention is further aggravated by the fact that the record is silent as to whether he was *actually* given the opportunity to use the telephone to contact an attorney or his grandmother after his arrest.[22]

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[22] [Direct questioning by Mr. Grove, the District Attorney, of Officer Hays]:

"Q. Okay. To the best of your knowledge, would he have had an opportunity to make a phone call to a lawyer had he had the chance?

"A. Yes, at the jail, I believe. He didn't know one and he wanted to get a hold of Mrs. Stockdale, I believe, Irma Stockdale and he had a

Another relevant fact is that Bradshaw was not arraigned on the furnishing charge Monday morning but was arraigned on charges arising out of his confession after business hours at 7 p.m. when bail was increased to $25,300.

Lastly, in considering the "totality of the circumstances," it should be emphasized that on the evening of Saturday, September 13, 1980, Bradshaw was found unconscious on the ground near Reynolds' cabin and the residence where Bradshaw was staying (Tr. 134-135, 144). Bradshaw had a large laceration on the back of his head. He complained of head and chest pains and was extremely intoxicated (Tr. 135). Bradshaw, an apparent alcoholic, later told a doctor at the hospital he had consumed two and one-half fifths of whiskey (Ex. 7, p. 2).[23] Bradshaw had been drinking all day preceeding the Sunday interrogation (J.A. 47).

In reviewing the above facts under a totality-of-circumstances test, waiver of the right to counsel must be knowingly, intelligently and voluntarily made. The state must prove an intentional relinquishment of a known right. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). *Miranda* absolutely bars post-invocation/pre-waiver interrogation. Under the minority interpretation of *Edwards*, whether the arrestee of the police

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couple other things to do because I believe Mrs. Stockdale was leaving that night to go to St. Helens.

"Q. Okay.

"A. And he wanted to let them know—in fact, a police officer, I believe, went back to the—and told Mrs. Stockdale that he was in the Tillamook County Jail." (J.A. 18-19; Tr. 24-25).

The record does not disclose whether Bradshaw actually was given the opportunity to call anyone. This is corroborated by the fact that the police contacted Bradshaw's grandmother who was leaving town but never told her of her grandson's request. This left Bradshaw with no one to contact prior to the polygraph test.

[23] "Ex.7" refers to the Emergency Hospital Record.

initiated the new dialogue is an important factor. *Id.*, at 491 (Powell, J., concurring).

Additional principles apply in reviewing the waiver issue. *North Carolina* v. *Butler*, 441 U.S. 369, 373 (1979) indicated:

> "The courts must presume that a defendant did not waive his rights; the prosecution's burden is great. . . ."

Michigan v. *Mosley*, *supra*, cautioned:

> "[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Id.*, at 110, n.2. (White, J., concurring).

The state must clearly show an "affirmative waiver," *Carnley* v. *Cochran*, 360 U.S. 506, 516 (1962), that has been "specifically made." *Miranda* v. *Arizona*, *supra*, 384 U.S. at 470. A strong preference exists in favor of express waivers, but in limited cases a waiver "can be clearly inferred from the actions and words of the person interrogated." *North Carolina* v. *Butler*, *supra*, 441 U.S. at 373. A waiver will not be presumed from a silent record, *Tague* v. *Louisiana*, 444 U.S. 469 (1980). *Miranda* requires that ambiguity be interpreted against the interrogator. Finally, the Seventh Circuit has held that after a clear showing of the assertion of the right, the logic of *Miranda* requires a "proportionally clearer showing" of the waiver factors in order to establish a valid waiver. *Kennedy* v. *Fairman*, 618 F.2d 1242, 1246 (7th Cir. 1980).

In light of these principles, the state did not adduce sufficient articulable facts to rebut the strong presumption against waiver. Bradshaw did not expressly waive his right to counsel. He did not specifically indicate an intention to reopen the criminal investigation.[24] Other than saying he understood his

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[24] The readvice of *Miranda* rights before the polygraph examination on Monday morning does not establish waiver. Hays coerced Bradshaw's uncounseled agreement to take the test. Only the con-

"standing" (whatever that means in this context), Bradshaw remained mute.

As Bradshaw remained silent, Corporal Hays increased the pressure against him. Hays told Bradshaw he was arrested on the furnishing charge and told him their destination. Hays placed Bradshaw, who had been previously handcuffed, in the front seat of the patrol car in order to interrogate him. While driving to jail, Hays reaccused him of killing Reynolds in a vehicular homicide. Hays suggested he take a polygraph examination to "clear this matter up and find out actually what happened." (J.A. 17-18; Tr. 23-24). After being confronted with this calculated barrage of interrogation tactics, Bradshaw finally succumbed to the pressure. As a product of this compulsion, he "involuntarily" agreed to take the polygraph examination. On this record, the state has failed to prove a valid waiver under the totality-of-circumstances standard.

CONCLUSION

For the above reasons, the judgment of the Oregon Court of Appeals should be affirmed.

Respectfully submitted,

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sultation with a lawyer could correct the situation. Readvice of rights in this case should carry no more weight towards finding a valid waiver than the advice of rights that was given in *Taylor* v. *Alabama, supra; Dunaway* v. *New York, supra,* and *Brown* v. *Illinois, supra.*

APPENDIX A

A LIST OF NON-INITIATORY STATEMENTS

After an arrestee has asserted the right to counsel, he may make statements concerning his independent statutory and constitutional rights or concerning irrelevant matters without initiating further interrogation. To establish initiation, the state must show that an arrestee clearly and specifically reopened the substantive criminal investigation. The following list involves classes of hypothetical statements that do not constitute initiation.

I. A STATEMENT MADE AT THE ARREST SCENE OR DURING TRANSPORTATION TO THE JAIL IS NOT INITIATION IF IT IS "NORMALLY ATTENDANT TO ARREST AND DETENTION" AND NOT RELEVANT TO THE SUBSTANTIVE CRIMINAL INVESTIGATION.

A. Statements about being frisked.

B. Statements about being handcuffed.

C. Responses to an officer's instructions concerning his behavior in the patrol car.

D. Statements about defendant's physical condition.
   1. Medical symptoms.
   2. Need to urinate.

E. Statements about defendant's state of mind.
   1. Anger
   2. Concern or confusion.
   3. Paranoia.

F. Statements about environmental matters.
   1. Weather.
   2. Traffic conditions.
   3 Landscape.
   4. Condition of squad car.

G. Statements about the officer.
   1. Irrational insults.
   2. Comments concerning the officer's appearance, attitude or conduct.

H. Requests to contact other persons.
   1. Attorney.
   2. Relatives or friends.
   3. Desire to reschedule appointments.

I. Statements concerning the safekeeping of defendant's property.
   1. Defendant's personal effects.
   2. Disposition of his automobile.

J. Statements concerning procedural aspects of arrest and custody.
   1. Location of the jail.
   2. Opportunity for a phone call.
   3. Parameters of security release.
   4. Detention procedures.
      a. Meals.
      b. Visitors.
      c. Medical treatment.
      d. Conditions.
   5. Time of arraignment.
   6. Time sequence for appointment of counsel.

II. A STATEMENT MADE DURING THE BOOKING PROCESS IN WHICH A DEFENDANT DOES NOT SPECIFICALLY ASK TO REOPEN THE CRIMINAL INVESTIGATION IS NOT INITIATION.

A. Statements during intake interview.

B. Statements during identification photograph procedure or fingerprinting.

C. Statements during exchange of clothes, property inventory, search of person, seizure of physical evidence.

D. Request for a phone call.

III. A STATEMENT MADE TO A SECURITY RELEASE OFFICER IN THE ROUTINE INTERVIEW FOR RELEASE AND APPOINTMENT OF COUNSEL IN WHICH A DEFENDANT DOES NOT SPECIFICALLY ASK TO REOPEN THE CRIMINAL INVESTIGATION IS NOT INITIATION. SEE ORS 136.040.

IV. A STATEMENT MADE IN JAIL BEFORE THE ARRIVAL OF COUNSEL IN WHICH A DEFENDANT DOES NOT SPECIFICALLY ASK TO REOPEN THE CRIMINAL INVESTIGATION IS NOT INITIATION.

A. Request for telephone call.

B. Request for medical attention.

C. Request for food or cigarettes.

D. Request for reading material.

E. Complaints about jail conditions or conflicts with other inmates.

F. Questions about the procedural steps normally attendant to detention.

V. SPECIFIC EXAMPLES OF NON-INITIATORY REMARKS.

A. Well, what is going to happen to me now?

B. When may I call my lawyer?

C. When will a lawyer be appointed?

D. When will the lawyer see me?

E. When may I make a phone call?

F. May I call my grandmother?

G. May I reschedule my appointments?

H. Where are you taking me?

I. How far away is the jail?

J. Will I be able to see a doctor concerning my injured head?

K. May I be released on my own recognizance or admitted to security release?

APPENDIX B

ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 42-50 (1975)
(Excerpts)

ARTICLE 140. CONDITIONS OF INVESTIGATION DURING CUSTODY OF AN ARRESTED PERSON

Section 140.1. Permitted Investigation

Subject to the provisions of this Code and other laws, any law enforcement officer or other authorized person may

(a) question an arrested person as authorized in Section 140.8;

(b) conduct procedures designed to permit the identification of an arrested person, as authorized in Article 160.

Section 140.2. Deception as to Obligation to Make Statement

No law enforcement officer shall attempt to induce an arrested person to make a statement by indicating that such person is legally obliged to do so.

Section 140.3. Abuse, Threats, Denial of Necessities

No law enforcement officer shall attempt to induce an arrested person to make a statement or otherwise to cooperate, by subjecting, or threatening to subject, such person or any person in whom such person is interested to any form of abuse, including any practice designed to unsettle, frighten or degrade, or by depriving any arrested person of adequate food, water, medical attention, rest or other physical necessities.

Section 140.4. Unfair Inducements of Statements

No law enforcement officer shall attempt to induce an arrested person to make a statement or otherwise cooperate by

(a) questioning of such unfair frequency, length or persistence as to constitute harassment or such person; or

(b) any other method which, in light of such person's age, intelligence and mental and physical condition, unfairly undermines his ability to make a choice whether to make a statement or otherwise cooperate.

Section 140.5. Use of Drugs, Hypnosis, Polygraph or Similar Techniques

No law enforcement officer shall seek to obtain information from an arrested person by using drugs or hypnosis, or a polygraph test or other such procedure designed to determine the truthfulness of statements by body reactions, unless, after such procedure has been proposed, such person has had an opportunity to consult with counsel for a period adequate to obtain advice concerning such procedure and has consented thereto.

Section 140.6. Creating Risk of Untrue Incriminatory Statements

No law enforcement officer shall take any action which is designed to, or which under the circumstances creates a significant risk that it will, result in an untrue incriminating statement by an arrested person.

Section 140.7. Access, Consultation and Telephoning Rights

(1) *Access to an Arrested Person.* An attorney undertaking to act as counsel for an arrested person shall have prompt access to such person, by telephone, and in person on counsel's arrival at any place where such person is detained. Counsel for an arrested person shall not be prevented from staying at any such place and being allowed access to the arrested person whenever such person requests his presence. If no counsel for the arrested person is present, similar privileges must be accorded to a relative or friend of the arrested person.

(2) *Consultation and Telephoning Rights.* An arrested person shall be given reasonable opportunity from time to time during his detention to consult in private with counsel or any relative or friend present in lieu of counsel, and, upon request, to use the telephone.

Section 140.8. Conditions on Questioning Arrested Persons

(1) *No Questioning Prior to Warning or Access to Telephone.* No law enforcement officer shall question an arrested person after he has been brought to the police station or otherwise attempt to induce him to make a statement unless he has been advised by the station officer in plain understandable language

(a) that he is not obliged to say anything and that anything he says may be used in evidence against him;

(b) that he will not be questioned unless he wishes, and that he may consult a lawyer before being questioned and may have a lawyer present during any questioning; and

(c) that if he wishes to consult a lawyer or to have a lawyer present during questioning, but is unable to obtain one, he will not be questioned until a lawyer has been provided for him; such advice shall also include information on how he may arrange to have a lawyer so provided.

No law enforcement officer shall question any arrested person who has been brought to a police station until he has been afforded an opportunity to use the telephone pursuant to Subsection 130.1(5).

(2) *Waivers.* Unless an arrested person is represented by counsel, and his counsel is present or he and his counsel have consented thereto, such person shall not be questioned after he has been brought to the police station unless he waives his right to counsel in accordance with the following procedures:

(a) After giving the warnings of rights required by Subsection (1), the station officer may then inquire whether the arrested person wishes to waive his right to counsel and to make a statement or consent to questioning in the absence of counsel.

(b) If the arrested person in response to such inquiry indicates that he wishes to make a statement or consents to questioning in the absence of counsel, he shall be asked to sign a writing to that effect which the station officer shall countersign.

(c) The arrested person shall be informed that any waiver given hereunder may be revoked by him at any time.

(d) No waiver shall be sought from an arrested person at any time after he has indicated in any manner that he does not wish to be questioned or that he wishes to consult counsel before submitting to questioning.

(3) *Revocation of Waiver.* If at any time after an arrested person has waived his right to counsel pursuant to Subsection (2), such person indicates in any manner that he wishes to revoke such waiver, or that he does not wish to be questioned or to make a statement, or that he wishes to consult counsel before submitting to further questioning or making a statement, such waiver shall be deemed revoked.

(4) *Period of Lawful Questioning.* No law enforcement officer shall seek a waiver of the right to counsel from an arrested person, or question such person pursuant to such a waiver, after the later of (a) the end of the [two] hour period provided for in Subsection 130.2(1) or (b) the end of the period of screening authorized by Subsections 130.2(2) and (3).

(5) *Non-Investigative Questioning.* As used in this Code "questioning" refers to questioning designed to investigate crimes or the involvement of the arrested person or others in crimes. Compliance with the procedures for questioning set forth in this Code is not required in connection with other conversation between the arrested person and law enforcement officers.

(6) *Questioning to Obtain Information Not For Use Against Arrested Person.* A law enforcement officer may question an arrested person without complying with this Section if prior thereto the prosecuting attorney has determined that he will not use against the arrested person in any proceeding any statement obtained by such questioning or any other evidence obtained as a result of such statement. Such determination by the prosecuting attorney shall be communicated to the arrested person prior to such questioning and a written record

thereof shall be furnished to him. No statement or other evidence obtained as a result of a statement obtained pursuant to this Subsection shall be used in any proceeding against the arrested person.

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No. 81-1857

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OREGON

Petitioner,

v.

JAMES EDWARD BRADSHAW

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

I

Bradshaw's arguments in favor of the so-called *per se* rule demonstrate its general unworkability as an analytical tool in confession cases.

In the first three parts of his argument, Bradshaw defends the "*per se* rule" suggested by the majority opinion in *Edwards v. Arizona*, 451 U.S. 477 (1981), and its application to this case by the Oregon Court of Appeals. Bradshaw argues that, once a suspect has asserted his right to counsel, there can be no waiver of that right unless, as a threshold matter, any subsequent interrogation is "initiated" by the suspect. In doing so, however, Bradshaw finds it necessary, or at least desirable, to define further the concept, enunciated in *Edwards*, of "initiating" conversation. He suggests a list of questions that an arrestee may ask the police without being held to have "initiated" further conversation, and he proposes that *Edwards* be "clarified" and "strengthened" by the promulgation of an elaborate code of conduct for the police to follow in dealing with an arrestee. Bradshaw's arguments in favor of the purported rule of *Edwards*

reveal the fundamental flaws of that rule.

Bradshaw proposes that "initiation" be defined to include only

> "* * * statement[s] by an accused that clearly [indicate] an intentional abandonment of the right to counsel, an assertion of competence, and a definite willingness to represent himself in discussions with authorities concerning the substantive criminal investigation." (Brief for Respondent at 11, 16).

Not surprisingly, the inquiry that Bradshaw made of Corporal Hays in this case, "What is going to happen to me now?" heads his list of specific examples of non-initiatory inquiries (Brief for Respondent at 16, Appendix A).

No one would contend that every statement or request an arrestee might make after invoking his right to counsel should be held to constitute a waiver of that right. A request to use the telephone, for example, is not normally a consent to further interrogation. However, the core issue whether a previously asserted right to counsel has been waived is not illuminated by discussing whether a particular statement "initiates" further conversation. It will not always be clear from a suspect's statement whether it was intended to elicit a specific limited response from the police or whether it was intended to reopen a prior conversation. Focusing on the seemingly mechanical inquiry of initiation soon will bog the court down in an analysis of the totality of

the circumstances to determine not whether the statements were voluntary and not whether the waiver was knowing and voluntary, but whether there was, in fact, "initiation." As Bradshaw's discussion of initiation discloses, resolution of that issue often will be difficult.

In the present case, for example, Bradshaw's question, "What is going to happen to me now?" could have been, as Bradshaw now argues, "a limited question concerning procedural aspects of detention on the alcohol charge" for which he had been arrested. It just as well might have been, as the trial court viewed it, a tentative resumption of the conversation which Hays had terminated upon Bradshaw's assertion that he wanted an attorney, "before it goes very much further." In order to determine the import of a statement, one must often look, as the trial court did in this case (J.A. 42-43; Tr. 81-82), to the "total context" in which such a statement is made.

As a practical matter, under Bradshaw's approach, the "totality of circumstances" must be considered to determine whether the suspect "initiated" further conversation; then the "totality of circumstances" must be considered to determine whether a previous assertion of the right to counsel has been waived. Regardless of the definition given to "initiation, such an approach is needlessly dupli-

cative. When coupled with Bradshaw's proposed definition of initiation, which effectively requires that the suspect's statement itself indicate a waiver, the approach would impose an insurmountable burden on the prosecution.

Attempts such as Bradshaw's to propound a universal definition of "initiation," or to categorize every possible statement an arrestee might make as "initiatory" or "non-initiatory" are misguided and bound to fail. Such definitions or lists unavoidably must be either overbroad or underinclusive. They may be drawn so restrictively that they prohibit the use of some statements which clearly were not the product of police impropriety; or they may be drawn so broadly that they fail to exclude some statements which a trial or appellate court may think suspect. As a result, the very concept of "initiation" would be distorted in the process of attempting to apply it.

In the present case, for example, it is clear that, in any ordinary sense of the term, Bradshaw "initiated" further conversation with Corporal Hays by inquiring "What is going to happen to me now?" Indeed, even before *Edwards* was decided, the trial court characterized this inquiry as "initiating" conversation. The trial court relied upon this initiation as one of several factors supporting its conclusion that Bradshaw waived his earlier request for counsel, (J.A. 42-43; Tr. 81-82), prior to the

conversation in which he agreed to submit to a polygraph examination wherein he ultimately admitted his guilt. (J.A. 42-43; Tr. 81-82). Yet the Oregon Court of Appeals, upon concluding that Hays somehow had taken unfair advantage of a fully advised defendant when he suggested the polygraph examination, held that Bradshaw's inquiry was not "initiation," within the meaning of *Edwards*.

If the "initiation" standard is as amorphous as this case proves it to be, it is no standard at all. It should be abandoned, and the "totality of circumstances test" adopted in its place.

II

Bradshaw's "totality of circumstances" analysis, largely based on matters urged for the first time in this Court, is not supported by the record in this case.

In part IV if his argument, Bradshaw purports to find, in the "totality of circumstances test," a license to raise issues that never were suggested below. He apparently theorizes that the "totality of circumstances test" entitles him to ask this Court to review *de novo* all of the circumstances surrounding his arrest and subsequent statements, whether or not any constitutional significance was placed on those circumstances below.

The short answer to this portion of Bradshaw's argument is that the court of appeals did not decide

this case by weighing the factors advanced by Bradshaw for the first time here. The court decided the case solely on the basis that Bradshaw's inquiry, "What is going to happen to me now?" did not "initiate" further conversation, within the meaning of *Edwards*. However, to dispel suspicion that we think there is any merit to the substance of Bradshaw's "totality" analysis, we note the following matters.

(A) Bradshaw asserts that his original arrest for furnishing liquor to a minor was illegal. He argues that that offense is classified as a "violation" under Oregon Law, and he observes that the Oregon statutes do not authorize peace officers to make warrantless arrests for mere "violations," not committed in their presence.

There are at least three responses to Bradshaw's argument on this point. First, the legality of his arrest was not questioned below, and this Court need not consider Fourth Amendment issues presented for the first time here. *See Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Second, as Bradshaw acknowledges (Brief for Respondent at 38, n. 19), whether his arrest was authorized by state law is immaterial to whether it violated the Fourth Amendment.[1] Final-

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[1]After acknowledging this, however, Bradshaw goes on to argue that

(Continued on next page)

ly, it is not at all clear that furnishing liquor to a minor *is* only a "violation" under Oregon law. The proper classification of that offense is, at most, a question which the Oregon courts have not resolved. There is no reported Oregon decision addressing whether the fact that a mandatory *minimum* sentence is prescribed for furnishing liquor to a minor by Oregon Revised Statutes (ORS) 471.410(3) precludes the imposition of a greater sentence under the general penalty provisions of the Oregon liquor laws. No Oregon appellate court has ever held that the offense is not a misdemeanor for which a warrantless arrest may be made, even when the arresting officer did not see the crime committed.[2] The Court need not and should not resolve this technical issue of Oregon law in this case.

(B) Bradshaw suggests that his arraignment on the charge of furnishing liquor to a minor was unreasonably and purposely delayed, with the objective of obtaining his confession to the homicide under investigation. Bradshaw was arraigned at

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(Continued from previous page)

> "The invasion of Bradshaw's personal liberty including the indignity of Officer Hays' warrantless arrest, handcuffing, probable fingerprinting, photographing, search and imprisonment in jail clothes without bail or with excessive bail dispels any notion of a valid waiver."

Quite apart from its tenuous connection with the record, this argument proves too much. If it were correct, almost no one subjected to the "indignity" of a warrantless arrest ever could give a valid post-arrest confession, under Bradshaw's view of the "totality of circumstances test."

[2]ORS 471.990(1) provides: "Except where other punishment is specifically provided for, violation of any provision of this chapter is a misdemeanor." Both the present language of ORS 471.410 and the legislative history behind the enactment of that language are unclear as to whether the mandatory minimum sentence precludes a greater sentence under this statute.

1:30 p.m. on Monday on the charge for which he had been arrested the night before (Ex. 11 at 1). He argues that this fact should be considered in determining the admissibility of his confession under the "totality of circumstances" test.

Again, no objection was made below to the alleged delay in Bradshaw's arraignment, and this Court need not address the matter here. We submit, however, that the very fact that as Bradshaw puts it, "The record is silent as to why Bradshaw was not arraigned earlier Monday morning * * * " (Brief for Respondent at 35), indicates that no arraignment issue was presented by the facts of the case. For the same reason, the record is also "silent" as to when criminal defendants in Tillamook County, Oregon, normally are arraigned and whether administration of the polygraph examination Bradshaw had agreed to take caused any delay whatever in his arraignment.

(C) In general, as the foregoing indicates, the methodology of Bradshaw's "factual" analysis is suspect. He consistently suggests the most sinister possible interpretation of the facts in the record. Where the record is silent, he implies even more nefarious doings. He draws inferences not suggested below from police reports which were admitted into evidence only during trial, not during the hearing on the admissibility of his statements, and which were

not called to the attention of the courts below in connection with the admissibility of his statements. In this way, he portrays himself as an injured and intoxicated man, helplessly held incommunicado by the police while they subtly induced him to abandon his request for counsel, to submit to a polygraph examination, and ultimately, to confess. This is not the record before this Court.

We cannot detail all of Bradshaw's factual distortions and errors in this reply brief, but the following examples are typical.

(1) Bradshaw suggests that he is "an apparent alcoholic" (Brief for Respondent at 11, 44), whose ability to cope with the police was impaired by the injuries he received in the accident under investigation and by the fact that he "had been drinking all day preceding the Sunday [night] interrogation" (*Id.* at 44). To the contrary, the only evidence of alcoholism is the fact that Bradshaw had been drinking heavily on the day of the accident, both before and after it occurred. Moreover, he affirmatively told Hays that he was not under the influence of alcohol at the time of the interview and that he had consumed only three or four 16-ounce containers of beer that day (J.A. 47-48; Ex. 2 at 3-4). The only evidence regarding Bradshaw's injuries is that he had been treated at a local hospital for his injuries and released. During the interview with Hays, he made

no complaint of any present discomfort from the injuries he had received the night before.

(2) Bradshaw complains that he was not immediately provided an attorney or an opportunity to contact one. However, Bradshaw's "request" for an attorney was made some time after 8 o'clock on a Sunday night (*see* J.A. 45; Ex. 2 at 1). It is not clear how immediately an attorney must be made available to someone who indicates that he wants one, "before it goes very much further." In any event, the trial court was entitled to find, and did find, that on the way to the county jail, Bradshaw changed his mind, of his own volition, about talking to the police before conferring with counsel. Furthermore, Corporal Hays indicated in his testimony that a telephone was available to Bradshaw at the county jail, but Bradshaw apparently did not know an attorney whom he might contact (J.A. 18; Tr. 24). Nothing in the record indicates that Bradshaw ever requested that the police immediately contact an attorney on his behalf.

(3) Bradshaw suggests that he never was given the opportunity to telephone his grandmother. He asserts that when the police contacted her on his behalf, they did not fairly apprise her of Bradshaw's situation, but rather allowed her to abandon him to their mercies by leaving town as she had planned. The record is to the contrary. It is not at all clear

that Bradshaw's expressed desire "to get a hold of" Irma Stockdale—who, incidentally, is *not* his grandmother (*see* J.A. 62-63; Ex. 2 at 17)—was anything more than a request that she be notified of his arrest. The record is silent as to the precise content of the conversation between Mrs. Stockdale and the police. On this record, it is impossible to discern the evil motives which Bradshaw attributes to the police or the coercive consequences of their alleged strategy.

In short, contrary to Bradshaw's distortion of it, the record in this case shows that Bradshaw's rights were scrupulously honored by the police, from the time he was first interviewed at the Rockaway police station as a possible suspect in the homicide under investigation, through the administration of the polygraph examination and his subsequent confession. He was advised of his *Miranda* rights at the police station, even though he was also told he was free to leave at any time. He was readvised of those rights when he was formally arrested for furnishing liquor to a minor. He again was reminded of his rights when he asked what was going to happen to him, and he acknowledged that he understood his situation. He was readvised of his rights the next morning, prior to the administration of the polygraph examination he had agreed to take the night before. The trial court disbelieved Bradshaw's

claim that the polygraph examiner induced him to confess by telling him that the police could "break down" his story. There is nothing in the record to indicate that the dialogue between Bradshaw and the police was anything other than the casual, wide-ranging conversation described by the police and corroborated by the tape-recorded interview between Bradshaw and Hays. Nor is there anything to indicate that Bradshaw comported himself in any way other than as the cooperative, concerned innocent person he professed to be during the interview with Hays, on the way to the county jail, and at the time the polygraph was administered. Bradshaw's confession, upon being told—apparently in response to his own inquiry about either the polygraph machine or the examination—that the polygrapher thought he had been untruthful, was not the product of a will overborne by police disregard of his rights. Under any reasonable application of the "totality of circumstances" test, his confession is admissible.

CONCLUSION

For the above reasons, as well as those previously stated in our opening brief, the judgment of the

Oregon Court of Appeals should be reversed and this case remanded for further proceedings.

Respectfully submitted,

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NO. 81-1857-CSY	TITLE Oregon, Petitioner v. James Edward Bradshaw

DOCKETED	COURT
Apr. 5, 1982	Court of Appeals of Oregon

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Thomas H. Denney
	Counsel for Respondent: Gary D. Babcock
Apr. 5, 1982	Petition for writ of certiorari filed. (Record filed).
May 12, 1982	DISTRIBUTED. 5-27.
May 25, 1982	Response requested.
June 23, 1982	Motion of respondent for leave to proceed in forma pauperis, and brief in opposition filed.
June 30, 1982	DISTRIBUTED. SL5P1.
Oct. 25, 1982	DISTRIBUTED. 10-29.
Nov. 1, 1982	The motion of respondent for leave to proceed in forma pauperis is GRANTED. Petition GRANTED.

Dec. 18, 1982	Joint appendix filed.
Dec. 18, 1982	Brief for the petitioner filed.
Jan. 15, 1983	Brief for respondent filed.
Feb. 15, 1983	CIRCULATED.
Mar. 21, 1983	Reply brief for the petitioner filed. (D).
March 28, 1983	ARGUED.